ANOTHER

LETTER

TO

Mr. ALMON,

IN

MATTER OF LIBEL.

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M.DCC.LXXI.

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Tros Rutulusve fuit nullo discrimine habebo.

SIR, *Aug.* 5, 1770.

NOTWITHSTANDING the retired situation of my life, I have by accident, whilst in the country, heard of some late legal incidents which have excited my attention. Permit me, therefore, to say a word to you about them. They seem to forebode, I think, a revival of the obsolete, arraigned, and condemned doctrine about State-libels, and to betoken a renewal of the sophistical and ingenious fictions which formerly were wont to be practised in its support. For my own part I cannot, from the abuse of the press, be brought entirely to damn the thing itself; let the virulence, the profligacy and outrageousness of hireling, interested or factious writers be ever so great. Nevertheless, I am frank to confess, that the most infamous scandal is daily spread by the most abandoned of men through this channel, and that the present system of party-writing seems to be to attack the constitution and government, instead of assailing and traducing the administrers of it. It is with pleasure, therefore, I see the authors and propagators of such dangerous productions prosecuted. But, from a desire of suppressing these pests of society, let not the officers of law overstep the line of justice, nor substitute artificial for real conviction, and thereby give footing to a code of libel-polity, which may hereafter be turned to the destruction of all liberty in the press, the best and only bulwark of manly freedom and liberal science.

I was told ſome time ago, that by a verdict in the caſe of a certain libeller, he was found 'guilty of printing and publiſhing only.' I could ſcarcely credit my informant, and ſaid, ſurely the Judge muſt have refuſed to take ſuch a partial verdict, and muſt have inſtructed the Jury, that it was their province to find the defendant guilty or not guilty of the charge; that is, of wickedly and ſeditiouſly putting forth the paper. But my friend aſſured me, the fact was as he had related it. I begged then to know whether this unuſual verdict was delivered in the common way, in open court, in preſence of the council. His anſwer was no, it was a private verdict, given by conſent, out of the county where the trial was had, at ten at night, in the midſt of a mob, who entered the Judge's houſe along with the jury. Upon which I aſked, whether it was imagined that this mob had raiſed the fears of the Judge, and diſordered his underſtanding, adding, that be this as it might, I preſumed the Jury had, according to the conſtant practice, when they deliver privy verdicts, been directed to come again the next morning into the public court, and been there interrogated, whether they had given ſuch a privy verdict, and now ſtood to it. My friend returned, that no ſuch thing was done. I contented myſelf with ſaying, this then will make ſome noiſe.

Agreeably to that ſurmiſe, I have been recently informed from news-papers and magazines, that the matter has already been ſtirred before the proper tribunal, where it has been deemed ſo extraordinary a caſe by the bench, as to be ordered to ſtand over for farther conſideration, until the next term. A ſuſpenſe of judgment, for the whole long vacation, will certainly give leiſure for deliberation, as well as for proper converſe upon the ſubject. At the ſame time it demonſtrates a real difficulty or nicety in the thing, for otherwiſe, the preſent grand juſticiary of England, ſo renowned for diſpatch, would never have conſented to any poſtponement. This learned perſonage is known to abhor delay, and to be perfectly free from craft. It follows, therefore, that he muſt be animated by the pure deſire of maturer reflection upon the point, and not by the hope of compaſſing ſome hollow unanimity in his court, by private colloguing, or of warping their underſtanding by ſubtle diſtinctions, into ſome conceſſion to a particular poſtulatum, or preſumed legal hinge, upon which the whole may be ſpeciouſly proved to turn.

Indeed, I have heard it whiſpered, that this caſe is likened to that of the 'K. againſt Beare,' which may be

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met with in ſeveral of the law reporters*, and was determined by the King's Bench, when the great Lord C. J. Holt preſided. So auſpicious an authority made me look into the books, and a curious caſe it ſeems to be, as well as moſt others, relative to this head of imperial offences. Metaphyſics are introduced, common ſenſe for ever laid aſide, and a technical interpretation put upon the ſimpleſt of all expreſſion, the verdict of twelve plain men, neither bred to the law, nor to any other learned profeſſion, unaccuſtomed to the refinements of ſcientific language, nay, abſolute ſtrangers to all the chicanery of words, and denominated for this, among other reaſons, 'the country.' One would think it was the aim of lawyers to perplex every thing, or they would never reſort to profeſſional quiddities as a gloſſary for the language of ordinary life. There is no other poſſible way of miſtaking the true meaning, and of inducing a ſenſe different from what was intended. Lord Mansfield, to his great houour, has, I know, always ſcouted this ſort of learned folly, and very early gave a happy preſage of the liberality of his future proceedings. The ſtory goes, that a diligent book-read advocate, one day was citing before him (ſoon after his promotion to the bench) ſeveral black-letter caſes, to prove the genuine conſtruction of an old woman's deed; whereupon his Lordſhip interrupted the ſtream of this learning, by aſking, whether he thought the old woman had ever heard of thoſe caſes, and, if not, what common-ſenſe muſt ſay to the matter; and immediately decreed for common-ſenſe againſt Dyer, and one other moſt learned reporter, to the abſolute diſcomfiture and aſtoniſhment of the pains-taking counſellor, and the ſatisfaction of the whole audience. If this acute Lord acted thus, where the matter was reduced into writing by ſome attorney, in all probability, what muſt be his conduct with reſpect to a verdict delivered *ore tenus*, by word of mouth merely, by twelve mere laymen?

But let us now ſee how far the caſe of the 'King againſt Beare,' when rightly underſtood, is or is not a precedent for governing the determination in the matter actually depending. Bear was indicted † for "treacherouſly "falſely and maliciouſly compoſing writings and making

"and

* Carthew, Salkeld, 12th Modern, Lord Raymond.

† "Quod ſubdolé falſo & malitioſe compoſuit ſcripta "& fecit

" and cauſing to be compoſed written and made and pro-
" curing and induſtriouſly collecting ſeveral ſcandalous
" falſe and ſeditious libels containing in them very many
" falſe malicious and ſeditious words and ſentences mat-
" ters ſayings and expreſſions of the Lord the now King
" and of his juſt government (to wit, in one of thoſe
" libels intitled 'The Belgic Boar to the tune of Chevy
" Chace &c'——) which falſe and ſcandalous libels (ſe-
" veral whereof were printed) he the ſaid Beare knowingly
" and clandeſtinely and ſeditiouſly on ſuch a day and long
" afterwards had and kept in his own hands and cuſtody
" and power in readineſs to be diſperſed divulged and
" publiſhed among the ſubjects of the ſaid Lord the
" King and factious and malicious perſons." The Jury thereon found * " that as to the writing and collecting
" only of the libels in the indictment mentioned the de-
" fendant was guilty and as to all the reſt in the ſaid in-
" dictment contained that he was not guilty thereof."

It was objected in arreſt of judgmen , that none could be given againſt the defendant upon this verdict, becauſe the Jury had acquitted him of all that part of the indictment which was criminal, and found him guilty 'only of writing and collecting' libels, which was rather a folly

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" & fecit & componi ſcribi &. fieri cauſavit ac ſibi pro-
" curavit & induſtré collegit ſeparale ſcandaloſos falſos &
" ſeditioſos libellos continent. in ſe de domino rege nunc
" & ejus æqua gubernatione quamplurima falſa mali-
" tioſa & ſeditioſa verba & ſententias materias diction.
" & expreſſion. (viz. in uno libello eorum intitulat. 'The
" Belgic Boar, to the Tune of Chevy-Chace —) quos
" quidem falſos & ſcandaloſos libellos (quorum diverſi
" fuerunt impreſſi) ipſe predict. J. Beare, 19 Oct. & diu
" poſtea in manibus & cuſtodia ſuis & penes ſe ſcienter
" & adviſaté clandeſtiné & ſeditioſé habuit & cuſtodivit
" in promptu & parat. ad eoſdem inter ſubditos dicti do-
" mini regis & factioſas & malitioſas perſonas diſpergend.
" divulgand. & publicand."

* " Quoad ſcriptionem & collectionem libellorum in
" indictamento mentionat. tantum quod defendens eſt
" culpabilis & quoad totum reſiduum in eodem indicta-
" mento content. quod defendens non eſt inde culpabi-
" lis."

than

than a crime; and that in Lamb's caſe in Lord Coke it was expreſsly reſolved, that the defendant muſt be found to be either the 'contriver or procurer, or publiſher of a libel,' otherwiſe he could not be convicted as a libeller*.

Indeed, to a common underſtanding, the Jury by finding him guilty of writing and collecting *only*, and by expreſsly finding him not guilty of all the reſidue of the indictment, had acquitted him of either making, or compoſing, or intending to publiſh, as clearly as it was poſſible. But the Court determined otherwiſe, and their reaſons are worth relating. The Chief Juſtice ſaid, that 'he did not regard the 'collecting,' and it was not the 'infamous matter or words which made the libel, for if 'a man had 'ſpoken' ſuch words, he would not be guilty 'of making a libel, it was the 'writing' which worked 'that effect, for it was not a libel before it was written; 'and, the writing being the eſſential thing, the copier of 'a libel was a maker of one, for the copy contained all 'things neceſſary to the conſtitution of a libel, viz. the 'ſcandalous matter and the writing, and therefore the 'copy of a libel was a libel, and of courſe the writer of 'ſuch a copy, a libeller. Indeed, in all caſes where a 'man does the act, which act cauſes the thing to be that 'which it is, that man ought to be conſtrued the doer of 'ſuch a thing. The copy had alſo the ſame pernicious 'conſequences, for it perpetuated the memory of the 'thing and ſome time or other would come to be pub-'liſhed. Beſides, bare writing was puniſhable in the 'Star-Chamber†. That though the writer or collector 'never publiſhed theſe libels, yet his having them in 'readineſs for that purpoſe, if any occaſion ſhould happen,

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* In the caſe of Lamb, a Proctor, 9 Co. 59 b. and the 8 Jac. 1. it was reſolved, even in the Star-Chamber, "that every one who ſhall be convicted ought to be a "contriver of the libel, or a procurer of the contriving "of it, or a malicious publiſher of it, knowing it to be "a libel. If he writes a copy of it, and does not publiſh "it to others, it is no publication of it." And the caſe of the Archbiſhop of Canterbury, or *de libellis famoſis*, in the 3 Jac. 1. 5 Coke 125, does not carry the doctrine farther; but, if it had, being a prior caſe it muſt have been controuled by that of Lamb.

† This aſſertion is without authority.

'was

'was highly criminal, and though he might design to 'keep them private, yet, after his death they might fall 'into such hands as might be injurious to the government, 'and therefore men ought not to be allowed to have such 'civil instruments in their keeping." He then twisted this fine-spun reasoning into the following logical thread. 'The making is the *genus*, and the composing, contriving, and writing, are the *species*. Therefore the finding the defendant guilty of the writing is the finding 'him guilty of the making.' But, not content even with this, he proves the same thing, another way, thus. 'The matter abstractedly considered is unlawful, and 'therefore the finding must be taken to be criminal. 'And, this being so, if the writing was innocent, there 'ought to be a special finding of the particulars which 'distinguished and excused it.' As to the puny justices Turton and Rokeby, they concurred with their chief *in omnibus*, with due deference, and yet some how or other the latter said, "that the verdict, being the words of lay "people, ought to be understood according to the vulgar "acceptation, and therefore though the writing in point "of law were making, yet it was understood in common "speech otherwise. And if the Jury found that the defendant did not make the libel, after which they should "find that which amounted to the making, that would "be repugnant and should be rejected, for all that was "inconsistent with what they had found before."

Had not this been a party matter, could it have been doubted whether the Jury meant to acquit the defendant of the atrocious part of the charge, of what constituted the crime, namely, of having composed, intended to publish, and written or collected, these writings, with an intent to vilify the government? And, supposing the writing to be innocent, by what rule of justice could the *onus probandi* be put upon the defendant, when every man is to be presumed innocent until proved the contrary. Not one of the Jurors had ever heard, I dare engage, of *genus* or *species*, or of the consideration of any thing in the abstract. By what maxim of law or common sense then could the Court put a technical construction upon their words, and by that means forge a sense the very reverse of what was intended? The perversion is palpable and destructive of the end of Juries, insomuch as it overturns their judgment, which is the judgment of the country, and substitutes that of so many regal judges, the precise evil against which

which the conſtitution had contrived the trial by jury a its barrier.

It may not now be amiſs to examine pretty particularly the logic of this determination, ſince it is growing into repute, and to ſee whether it be not arrant ſophiſtry, notwithſtanding the very reſpectable authority of my Lord Chief Juſtice Holt. The beſt men are inſenſibly ſwayed by party, and he was, it is known, a zealous revolutioniſt, and owed all his promotion to King William. His indignation, therefore, was likely to be inflamed by any attempt to diſparage or diſgrace that Prince. He muſt wiſh to check ſuch unwarranted abuſe of him, and, like every hearty friend to a cauſe, rather than not puniſh the object of reſentment, was willing to ſtrain a point and to create artificial, if he could not find real, ground in law for the purpoſe. He might conceive it was dexterity uſed for an honeſt end, and eventually for the ſupport of civil liberty, this Monarch being the great prop both of that and the Proteſtant religion. Such motives are at leaſt the beſt palliatives which I can ſuggeſt for ſo unprincipled a determination.

A ſmall attention to the caſe will convince any body that there is one fallacy running through it, built on the double ſenſe of the words 'writing and making of a writing,' which primitively and naturally import the inſcribing with a pen, pencil or *ſtylus*, but metaphorically and figuratively ſignify both the thoughts and language inſcribed. Which of theſe ſenſes be intended muſt be always aſcertained from the drift of the uſer, and this may be collected from the ſubject and context. The inventive being ſuperior to the manual faculty, the words are moſt frequently uſed, I allow, to denote the former. And, beyond all doubt, the making and writing of a libel mean, in common diſcourſe, the compoſing of a libel; as the author and indicter is uſually ſtyled the writer or maker of a book, nobody almoſt in ſpeaking, ever pointing out and deſigning the mere copier and tranſcriber by thoſe terms; becauſe the matter and contents of a literary performance are uſually the theme of ſpeech. However, among writing-maſters, clerks, hackney-writers, amanuenſes, private ſecretaries, and engroſſers, (and perhaps ſpecial pleaders) the writer and maker of a writing ſignify generally the mere copier, and in this ſenſe, copying is termed writing. The ſame application of the words is at times made by all people. This twofold ſignification furniſhed Lord Holt with a colour for proving every tranſcribing

ſcribing to be compoſing, or at leaſt ſeditious making. And he effected it, as the reader cannot have forgotten, thus. "The *genus* can always be predicated of each *ſpecies* within it. But making is a genus, and compoſing, contriving, and writing, are ſo many ſpecies under it. Therefore writing is making. Now Beare was the writer of the libel, *ergo* he was the maker." However, as it is the logical privilege of a reſpondent to introduce a diſtinction wherever his opponent introduces an ambiguous term, I ſhall take the liberty of doing ſo here, after premiſing, that it is eſſential to right reaſoning to uſe the ſame term uniformly in the ſame ſenſe, and that the contrary is falſe logic; and then I think the whole of this moſt curious ratiocination will fall to the ground.

In the caſe of Beare, where the charge was the compoſing and making of writings, the maker of them muſt mean the author, or at leaſt a ſeditious copier with an intention of libelling and defaming, and not every ſimple penner or tranſcriber. It is likewiſe evident from what the Chief Juſtice ſaid upon the occaſion, that by maker he himſelf meant the author and compoſer, or ſome ſeditious copyiſt. Nevertheleſs, although in the major propoſition he confines the term maker, to the author and ſeditious copier; in the minor he extends it to every copier and tranſcriber. There is, therefore, a vitious ambiguity in uſing the ſame word in two different ſenſes; and the whole of the reaſoning depends on this quibble, and paltry, diſingenuous duplicity of language.

To prove that by maker the Chief muſt mean the author, or at leaſt a ſeditious tranſcriber and intentional libeller, I need only recall to the reader's mind his Lordſhip's ſaying "ſuch writing cannot be underſtood of an "innocent writing, becauſe if any officer of the Court "(or ſtudent of the law) were to do it, it would be no "libel, inſomuch as it would not be done ad infamiam of "the party, but to bring the offender to juſtice, and it "would be only *tenor libelli*, and upon ſuch evidence the "defendant could not be fonnd guilty." If this be ſo, then it is clear that the mere writing and tranſcribing of the identical words and very tenor of a libel, will not be making a libel, unleſs ſuch writing and tranſcribing be done with an intention to defame. The writing out of a libel by an officer for the purpoſe of proſecution, or by a law-ſtudent for the ſake of ſcience, and (may I add) by a foreigner unacquainted with the meaning, by any native ideot, or by a ſchool-boy for a taſk, is agreed to be innocent, and

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that upon evidence of ſuch writing, the writer cannot be found guilty of a libel. Now, this being conceded, ſurely it follows of neceſſity, that the intention creates the eſſential difference, (to ſpeak logically) and is the circumſtance which conſtitutes the libel, ſo that the making of a libel cannot be predicated of every ſpecies of tranſcript or writing of it. But farther, the mere act of writing or tranſcribing, abſtractedly conſidered, cannot be unlawful; becauſe all reference or application to any object, man, or thing in particular, is then to be withdrawn, and nothing but a pen and ink with a hand moving it on paper can remain. And conſequently, if a Jury find a man guilty only of the act of writing and tranſcribing, that finding cannot be taken to be criminal in an univerſal or general ſenſe, or in the abſtract, but muſt be ſo taken in ſome particular and peculiar ſenſe, and this therefore ought to be made out as a ſpecial caſe by proper proof.

Is not all this fairly deducible from Lord Holt's own principles, and if it be, what can be ſaid for his determination, which from the ſame premiſes, drew the oppoſite concluſion?

If ſimply writing out a libel were the making of it, a law-tranſcriber, and every tranſcriber of the tenour of a libel, muſt be a libeller *ipſo facto*, and proof of ſuch writing out or tranſcribing, muſt be concluſive evidence to find him guilty. But Lord Holt maintains the contrary.

In reality the principles laid down in the "King a-"gainſt Beare" are juſt. They contain the true rules for a Jury to go by, in determining whether a man ought to be found a libeller or not, and furniſh alſo the true doctrine for conſtruing or interpreting verdicts when delivered out of the common form. The Jurors are thereby taught that they muſt collect from the complexion of the caſe, and all the circumſtances attending it, the intention of the writer, and, if they perceive the original compoſition, or the ſubſequent tranſcript to have been made with no view to traduce or to vilify, that they ought to find the defendant not guilty; becauſe the Judges cannot determine from the face of the writing, eſpecially in the caſe of a copy, whether it was done *ad infamiam* or not, this being a fact and reſulting from the intention of the writer; nor whether ſuch was made by him as an officer of juſtice or a law-ſtudent for his profeſſion, &c. all of this de-

pending upon the fact, and being mere matter of evidence for the Jury, who, if such writing were made by such officer or student, ought not after proof thereof, to find him guilty. Then as to the interpretation of the finding of any Jury, this same case establishes that the terms must be taken in their common and ordinary sense. For Mr. J. Rokeby lays down (really not unreasonably) that " the words of lay-people ought to be understood according to the vulgar acceptation; and therefore, though writing in construction of law be making, yet, as it is understood in common speech otherwise, it ought to be taken accordingly." From whence it is apparent that the finding of a man guilty of the writing is not in the language of a Jury the finding him guilty of the making a libel.

Upon the whole, the foregoing case indisputably establishes these axioms, that, whether the writer be author or copier, his being a libeller or not depends upon the intent with which he made the writing; that the Jury must be convinced the writing was made *ad infamiam*, before they can, on the evidence of the writing merely, find the writer guilty of a libel thereby; and that if they do not bring him in guilty, or not guilty, of the indictment, generally, their verdict must be construed according to its natural and common import in ordinary speech, and the words of it be neither forced from their artless and native meaning into a technical and scientific one, nor be carried to matters to which they do not refer.

For which reason, where there are more charges than one in an indictment, as in the case of Beare, namely, writing, collecting, making and intending to publish, if the Jury find the defendant guilty only of the writing and collecting, and not guilty as to the rest, it is a complete verdict, and is an evident acquittal of the defendant as a libeller; because we have proved from my Lord Holt's own mouth, that writing may signify copying, and collecting may be innocent, as in the very cases which he puts. Where then such writing and collecting have been charged to have been done with malice, and the defendant is found guilty 'only' of the writing (that is, of the copying) and collecting, the word 'only' (one would imagine) must mean to negative the imputation of malice which was charged on the writing and collecting; the word 'only' could otherwise have no valid and necessary meaning, but at best must surplu-

sage.

ſage. Beſides, the finding the defendant 'not guilty as to the reſt' goes to the other charges of making and intending to publiſh, and the word 'only' need not have been inſerted to negative them, for which reaſon it muſt have been inſerted to negative the malice ſuggeſted of the writing and collecting. And further, where a word can have any operative and proper meaning, it is never, according to the rules of grammatical or legal conſtruction, to be conſidered as ſurpluſage. Moreover, if the thing be doubtful, the favourable conſtruction is always to take place.

In truth, where the Jury are dubious upon the evidence as to the intent, they ſhould of themſelves, in mercy find the defendant not guilty. But, if they do not chooſe to do that, diſliking, perhaps, the man or his party, and being uncertain, whether he may not be guilty of ſome bad intent by his writing or copy, although no ſuch be ſatisfactorily made out, and therefore cannot be prevailed upon (where the ſcales are ſo even) to incline to the favourable ſide, and will rigidly find the man guilty of making the writing or copy; and yet, on the other ſide, they will not venture to ſay upon oath, that they believe he made the writing ſeditiouſly and maliciouſly, being not convinced, in their own minds, that there was real malice or ſedition therein, and therefore ſcrupulouſly inſerted the word 'only;' I ſay, in ſuch caſe, the merciful law of England does the thing which the rigid Jury will not do, and obliges the Judges to pronounce the defendant acquitted.

Upon this legal ground it might be maintained, that had the finding fallen ſhort of what it was, by dropping the word 'only,' the court ought to have conſidered the ſubſequent words of 'not guilty as to the reſt of the indictment,' as intended to acquit the defendant of every thing but what the Jury had expreſsly found him guilty of, viz. 'the writing and collecting,' and that otherwiſe, they would certainly have added the words 'ſeditiouſly and maliciouſly;' and that without ſuch addition, there was no crime found. Indeed the court cannot, by implication, ſupply thoſe, or any words in a criminal caſe, becauſe a man is to be proved and found, and not preſumed, to be guilty, and every thing muſt be taken moſt favourably for him. "All Courts of Juſtice, "more eſpecially on the plea of not guilty, muſt go, "*ſecundum allegata & probata*; if therefore the proſe- "cutor does not maintain by his proofs, the matter he "has alledged to the Court, he muſt fail of the juſ- "tice he would demand upon thoſe allegations, and

" with this agrees the rule of civil law, *quod proba-*
" *tiones ſint conformes libello.*"

For all which reaſons, the determination in the 'King againſt Beare,' ſtands ſelf-condemned. So much, I think, one may venture to ſay, is clear beyond the poſſibility of a doubt.

It would have been, I muſt allow, a ſtronger caſe, had the indictment been preferred againſt Beare, merely for 'ſeditiouſly writing and collecting,' and for no other cauſes, and the Jury had thereon found him guilty of 'writing and collecting only;' becauſe, in ſuch caſe, the word 'only' could have no poſſible other meaning, than to negative the ſedition, and it being contrary to all rule of conſtruction to give a word no meaning, and to regard it as ſurpluſage where a proper and a ſignificant meaning may be given to it, this interpretation muſt have been ſubmitted to.

But there being in the caſe of 'Beare,' other matter laid beſides writing and collecting (as has been before obſerved) namely, making and publiſhing it; perhaps it was contended, that 'only' was no more than an implied negative, and the additional words of 'not guilty as to the reſt of the indictment' were an expreſs negative of thoſe other matters, and therefore both the one and the other were applicable to the ſame things, and for that reaſon, the word 'only' need not be conſtrued to negative the malice and ſedition with which the writing and collecting were charged, and, if it were not ſo conſtrued, that then the finding of the defendant guilty of writing and collecting, would be a complete finding him guilty of all that part of the charge as laid, to wit, ſeditiouſly and maliciouſly. Upon this footing alone could the determination in the 'King againſt Beare' be pretended to be juſtified. And yet this will not do, for the anſwer before given will apply to it, namely, that ſedition and malice cannot be affirmed of every writing of libellous words, becauſe they cannot be affirmed of that of the clerk of indictments, or of the law ſtudent; the one does not univerſally comprize the other, therefore, the finding of the writing only, is not finding of the ſedition, more eſpecially in criminal proceedings. A Jury may, if they pleaſe, find guilt, by inference, without poſitive proof; but where 'they' do not find it expreſsly, no court can preſume it.

There is, beſides, another obvious anſwer, which is this: it is poſſible the Jury might mean, by the word 'only,'

'only,' to confine their verdict to the bare writing and collecting, and to negative the wicked purpose with which it was charged to have been done; and, this being possible, undeniably it was the duty of the Judge, seeing the finding to be capable of both interpretations, to ask which of them was agreeable to their meaning, because, that, and not the court's, was to be taken. But, if he omitted to do this at the time, he was bound afterwards to adopt the milder and most merciful interpretation, according to all the dicta of all the books. The reason why he did not, he that runs may read.

I can suggest to myself but one other shift which could be had recourse to, and that is the following: it might be urged, that the whole charge and trial being of a criminal nature, the defendant could not be an innocent man, and be found guilty of any part of it; it was a contradiction in terms. The whole, and every part was laid, to have been done with sedition and malice, which is guilt: therefore nothing but an acquittal could clear 'Beare' from all guilt; and that the word 'only' must be understood to import, that the Jury found him guilty solely of that part of the indictment, which charged him with writing and collecting, seditiously and maliciously. But this, I say, is entrapping by words; and the same sort of logic would prove, if I sat down to a dish of boiled rabbits, smothered with onions, and eat of the rabbit, that therefore I must have eat of the onions: whereas it would only be probable, and not certain: and, in matters of criminal law, where you are to proceed to punishment, you can go upon nothing but certainty. Probability may be a good ground for accusation and bringing to trial, but is a very bad one after verdict, for fine and imprisonment. And if any Judge were to be of opinion, that a man could not be innocent who was found guilty of any thing by a Jury, it would behove him to know from them what they meant by the word 'guilty,' and whether they really meant any more by it, than finding the defendant to have done the simple act charged. He ought, at least, in such a disputable matter, to inform them how he, and a court of law, must, construe such a verdict, forewarn them of the legal consequence, and directly tell them that there was no such thing in criminal law, as the finding of any fact charged, and finding it free from guilt; and if they meant the latter, they must wholly acquit the defendant,

dant, and not find him guilty at all. But the finding of the Jury, 'unleſs at the time of bringing it in,' it be ſo explained to them, muſt clearly be taken, according to their own vulgar acceptation of the terms as lay-perſons, and not in the artificial ſenſe of lawyers and cunning pleaders.

I will not ſuppoſe, on the contrary, that any Judge would try to inveigle a Jury into giving ſuch a verdict, by telling them, that the naked fact of writing and collecting (or printing and publiſhing, as the caſe may happen) was all that was before them. And yet, without ſome ſuch inſtruction, it is difficult to conceive how any Jury ſhould, of their own heads, ever think of finding ſuch a verdict. Such a proceeding ſeems to imply their having been ſophiſticated by ſome diſcourſe, which they did not thoroughly underſtand. It is not the natural effect of common-ſenſe. And I cannot ſay I much like a Judge, who is for ever dealing in nice diſcourſe with Juries.—"If thou'rt honeſt, thou'rt a deviliſh cheat." It is certain, that under ſuch inſtruction, my Lord Holt's law officer or ſtudent muſt be found guilty, and as certain, that if he were, the court of King's Bench could not afterwards relieve him. That court could have no means of getting at the fact; it could not go out of the proceedings and the record, but muſt judge upon the indictment, the plea, and the finding of the Jury. Every ſtep, therefore, taken in ſuch matters, proves the falſity and abſurdity of the poſition.

I cannot help wondering, how the zeal of a Whig ſhould ſo far operate upon the ſtern virtue and liberal mind of my Lord Holt, as to make him thus quirk away the genuine conſequences of his own legal tenets, for the poor purpoſe of wreaking party-reſentment upon a contemptible individual. How evidently was he tranſported, beyond the line of ſober judgment, may be ſeen from his urging in the caſe, that "tho' the writer or collector ſhould never publiſh or intend to publiſh the writings queſtioned, yet his having them in his cuſtody, was highly 'criminal,' for, notwithſtanding he may deſign to keep them private, after his death, they 'might' fall into ſuch hands as 'might' be injurious to government." And, therefore, forſooth, one muſt infer, that the defendant ought to be found guilty of, and puniſhed for a crime or injury as already committed, altho' it was agreed not to have been committed, and that he, perhaps, never intended

tended to commit it; merely becauſe it 'might,' one day or other, hereafter, be committed by ſomebody elſe.

Suppoſe this argument were applied to a gun or piſtol, which I had in my houſe, or in my hand upon the high-road. It was a dangerous weapon in itſelf, it might be employed to rob with, perhaps I did not intend to make that uſe of it, but I might, and, if I did not, ſomebody elſe, when I was dead, might; and robbery on the highway was a great crime, &c. &c. But, I will not animadvert upon ſo miſerable a ground for the puniſhment of any fellow-creature. To call ſuch a determination law or ſenſe, would be doing an injury to both. The poverty of human language is ſuch, that it does not produce any expreſſion ſufficiently demeaning, to give the proper name or epithet to ſo pitiful a degradation of the talent of rationality. (And perhaps it will not be the leaſt reproach to the liberality of the preſent times, that ſuch a caſe ſhould be called forth into light, from obſcurity and oblivion, to be made a precedent for any judgment to be given, either now or hereafter.) But thus it always is, and will be, when a Judge hath an eye to politics upon the bench. He aſſumes the legiſlator, and makes law inſtead of expounding it. He pronounces a judgment inconſiſtent with legal premiſes he himſelf has been laying down. In inflicting puniſhments, he reaſons from what may be, to what is; not on a crime, but on a tendency towards one; grounds himſelf as a criminal magiſtrate, upon ſuppoſitions too diſtant to be admitted in the logical diſputations of a novice at college. He invades the province of the Jury, by taking what is matter of fact from their judgment into his own, and puts beſides, his artificial conſtruction upon their ſimple verdict, to warrant what he has done. And this he calls doing juſtice in a trial by Jury, according to the Engliſh conſtitution.

Perhaps ſome friend to the argument of Lord C. J. Holt might tell me, I had miſrepreſented it, becauſe I had ſuppoſed him ſpeaking of the ſimple act of handwriting in the abſtract, whereas he had ſpoken of the act of writing or tranſcribing *a libel* in the abſtract. Were this to be ſaid, I ſhould tell the friend to his Lordſhip's argument, that there was no ſuch thing as a libel in the abſtract, becauſe a libel is the defamation of the ſtate, or ſome particular perſon. The eſſence of it is, its affecting ſomebody or individual. It cannot exiſt independent of time, place, perſon, and circumſtance. Now,

the

the conſideration of a thing in the abſtract, is conſidering it independently of all theſe. But the doing this by a libel, deſtroys its exiſtence. For which reaſon his Lordſhip, according to his friend's interpretation, muſt have talked nonſenſe in hard words.

Let us now aſk, in the language of a celebrated perſonage before alluded to, what common-ſenſe would ſay? I think it would be ſomething like this. Writing in the abſtract muſt be innocent, for it is no more than couching lines, figures, and letters upon paper. It muſt then, and can only be the matter, ſenſe, and application (or intention) which can render any matter criminal. Conſequently, to make a perſon guilty of a crime by writing, it muſt be made appear, that the writing in itſelf contains defamatory matter of ſome particular perſon, or of the government, and that the writer knew the meaning thereof, and had a wicked intention, by originally writing or copying, and publiſhing it. Were this not ſo, a native ideot, or a foreigner, ignorant of the language, an officer of juſtice tranſcribing for a tribunal, or a ſtudent for his profeſſional uſe, would be guilty of a crime by ſo doing. But this would be both abſurd and unjuſt, and of courſe not law. Therefore, in the general, the act of writing is to be preſumed harmleſs, and to ſhew it otherwiſe, you muſt prove a ſpecial caſe, ſome bad intent by ſuch writing. Mere arraignment or accuſation (whether in the ſhape of indictment, information, or action) does not, for this reaſon, put a man upon his defence, until ſome legal proof be produced in ſupport of ſuch accuſation. For every man is deemed to be innocent, untill he is ſhewn to be otherwiſe. And it is, agreeably to this maxim, that the law directs every thing dubious or ambiguous ſhall be conſtrued moſt favourably for the accuſed.

In all criminal proſecutions, it is agreed, there are two conſiderations for the Jury, which are, whether the fact charged was done, and, if it were *quo animo*; if it ſhould appear, after weighing all circumſtances, that notwithſtanding the fact had been committed, it was without any wicked intent, the Jurors ought to find accordingly, or to acquit. If a man be indicted for murder, and it appears, that tho' he killed the perſon mentioned in the indictment, he did it by accident, without malice, the Jury ought to bring it in manſlaughter or chance medley, or *ſe defendendo*, or to find the priſoner not guilty.

So,

So, where a man is profecuted for a libel, and not at liberty to plead any thing in juſtification, if the Jury are convinced, that altho' he wrote, or printed and publiſhed it, he did ſo, without any traitorous, ſeditious, ſcandalous, or malicious intent, they ought either to find him generally not guilty; or otherwiſe guilty of the ſimple fact, (of writing, or of writing and publication, or of both) and not guilty as to the reſt; or, if they leave out theſe laſt words, of the ſimple act 'only'.

The matter of libel, independent of the ſtatutes *de ſcandalis magnatum*, was ſcarcely heard of in this iſland, until the time of Coke; and the ſhort caſe of Lamb, by him reported, ſtates the law as reſolved upon this head, in the reign of a Stuart, by the ſevereſt of all courts, the Star-chamber, the fountain of this ſort of proſecution. And yet this dreadful court, upon ſolemn argument, rules, "that every one who ſhall be convicted, either ought "to be a contriver of the libel, or a procurer of the con- "triving of it, or a malicious publiſher of it, knowing it "to be a libel. If he writes a copy of it, and does not pub- "liſh it to others, it is no publication of the libel; for eve- "ry one who ſhall be convicted, ought to be a contriv- "er, procurer or publiſher of it, knowing it to be a "libel. But it is great evidence that he publiſhed it, "when he, knowing it to be a a libel, writes a copy of "it; unleſs afterwards he can prove, that he delivered it "to a magiſtrate to examine it; for then the act ſubſe- "quent explains his intention precedent." This caſe of Lamb is the laſt upon the ſubject in my Lord Coke; it was determined in the 8th year of James the Firſt, taken by his Lordſhip, when Chief Juſtice, and one of the Court of Star-chamber, and afterwards reported by himſelf. It comes, therefore, with all poſſible certainty to us, from the moſt accurate and conſummate lawyer that this country hath ever bred, and it is the report of his own deliberate judgment, which therefore he cannot be ſuppoſed to be miſtaken about. In the preface to this part of his Reports he ſays, "it has been his chief care and "labour for advancement of truth, that the matter might "be juſtly and faithfully related, no reaſon or argument "made on either ſide willingly impaired, and that ſuch "only as (in his opinion) ſhould hereafter be leading caſes "for the public quiet, might be imprinted and publiſhed." The caſe in queſtion too, as reported by Coke, hath, from his time to the preſent, been always underſtood to be the very code of libel-law; nevertheleſs, as it did not go

far enough for Lord C. J. Holt, and would not warrant the determination which, he was bent upon coming to, his Lordſhip denied the accuracy of the report, and ſaid, that Moore muſt be right in his repreſentation of the matter, and that "Coke ought to be expounded by Moore, "where the writer of a libel is deemed in law to be the "contriver; and then Coke might be admitted to be law, "otherwiſe not; for, in the caſe in Coke, the queſtion "was of the publication of a libel; and it was held, that "the writing of a copy of a libel was not a publication, "but only evidence of it; but no queſtion was made, if "he was a libeller; and for the matter of publication, "the having of a libel is not a publication. If a libel be "publickly known to be publiſhed, the having of a copy "is evidence of a publication; but *contra*, where it is "not known to be publiſhed *," This Moore was, at the time, a practiſing Serjeant at Law, and never roſe higher, and, one would conceive, could not know the ſenſe of the court, and the C. J.'s ſentiments better than his Lordſhip himſelf did. However, I will ſtate the Serjeant's report literally, and then leave it to the reader's judgment, whether it really and materially varies from Lord Coke. The Serjeant's report runs thus: "Several "queſtions aroſe about who ſhall be called publiſhers, "and what ſhall be called publiſhing of a libel. And it was "reſolved, that the procurer, and alſo the writer, are "both contrivers, that the procurer of another to publiſh "the libel, and the publiſher himſelf are both publiſhers, "that the reading of the libel, nowiſe knowing it to be "a libel, is not publiſhing; that he who writes the copy "of a libel, by the command of his maſter, or his father, "is not a publiſher; and that he who lends a libel to be "copied, and he who repeats the libel, or any part of it, "knowing it to be a libel, is a publiſher; and ſo, if one "write the copy by the command of his maſter or his "father and carry it to another, he is a pub-"liſher; for Coke ſaid, *nec domino nec patri in illicitis "obediendum eſt*. Note alſo in this caſe, a woman was "accuſed of being a publiſher of this libel. And becauſe "ſhe did not know, by reaſon of the infirmities of her "ſex, whether it was any offence or not to ſpeak of the "ſaid

* K. againſt Beare in Lord Raymond, who ſeems to have beſt put together what fell from the bench, altho' the 12th 'Modern' has done it very well; but Carthew hath ſtated the indictment and poſtea the moſt completely.

" ſaid libel, ſhe was admoniſhed without cenſure, for " Coke, Chief Juſtice of the Common-Pleas, ſaid, that " *fœminæ ſunt imbelles & ſine felle.* And he ſaid, *fœmina* " *ſi neſcit, clericus miles & cultor, parcat ei judex & ultor.* " The Lord Chancellor ſaid, *inveniens libellum famoſum* " *& corrumpens punitur.*"

Now, would not any man, from the expreſſion of Holt, ſuppoſe that Moore had repreſented the Court to have determined the mere writer or tranſcriber, to be the contriver of a libel, whereas the word 'writer,' as uſed by him, and coupled with 'contriver,' means evidently the compoſer, and is the ſame with Coke's contriver, that is, the perſon procured by the original deviſor or thinker of the ſubject, to contrive and compoſe ſome writing thereon. Lord Coke denominates contriver, and procurer of the contriving, thoſe whom Moore calls writer, and procurer of the writing, as is plain, from the latter's immediately adding, they were both contrivers. In ſhort, the ſenſe and meaning are preciſely the ſame, tho' taken down and expreſſed in different words. The ſuggeſtor of the writing of a libel, and the writer, the procurer of the contriving, and the contriver, are the ſame in the eye of the law, they are both contrivers. And the whole ſtrain of Moore's report, agreeably to Coke's, evinces, that the Court, in this determination, never thought of conſidering any body as a libeller, or as publiſher of a libel, who did not know the purport and drift of the compoſition or writing. Notwithſtanding Holt's taking notice, that " the queſtion before the Court, was not concerning writing or making, but about the publication of a libel, and that the writing the copy of a libel, was merely mentioned to that point, and that no queſtion was made, how far ſuch writing a copy is criminal, and makes a libeller; and his Lordſhip's inſinuating from thence, that it was improper and unlikely for the Star-chamber Judges, to ſay a word about any thing but publication;" yet, it is certain, that both reporters concur in making them ſpeak about the contrivers of a libel, and that my Lord Holt himſelf cites Moore's report of this very caſe, to prove the writer of the copy of a libel to be a contriver. What unfairneſs, what inconſiſtency! There is but one way of accounting for this, which is, that K. William's Chief Juſtice, was reſolved to puniſh his libeller at any rate, and yet, as the verdict ſtood, there were difficulties in finding out legal ground for the purpoſe which reduced his Lordſhip to the neceſſity of uſing much metaphyſical al-

chymy, to change the nature and meaning of words. There was no authority for him. On the contrary, there was the great ruling caſe of Lamb directly againſt him, from the clear, determinate report of my Lord Chief Juſtice Coke, one of the Judges in the cauſe, and the very oracle of Law. But, when a man is once in for it, he muſt go through, and to this end, he diſputed the accuracy of Coke, and ſet up Serjeant Moore's, whoſe account, nevertheleſs, when looked into and conſidered, appears to be the ſame, although leſs perſpicuouſly delivered. What is remarkable too is, that in Lord Coke's very ſhort report, he has twice given the determination in queſtion, in the ſame words, ſo that, if miſtaken at all, it was twice miſtaken by him. This is rather too much to ſuppoſe, eſpecially as it has no other ſupport than the conſtruing of a word in Moore, capable of two ſenſes, into that which is moſt inconſiſtent with the reſt of his report, and is abſolutely incompatible with the poſitive expreſſion of Coke; which ſame Lord Coke, from the report of Moore, appears to have been the Judge of the moſt weight at the board, and is almoſt the only one particularly noticed by him. He cites his Lordſhip for excuſing a woman, becauſe *fœminæ ſunt imbelles & ſine felle*, (women are but weak in underſtanding, and without gall) and again, *fœmina, ſi neſcit, clericus, miles, & cultor, parcat ei judex*, (a woman, if ſhe is ignorant, clerk, ſoldier, and huſbandman—let the judge ſpare them.) The whole court, according to both reports, agreed in declaring, that the reading of a libel to another, not knowing it to be a libel, is no publication; and that the writer of a copy, by order of a maſter or father, is not a publiſher, unleſs he carry ſuch copy to another. From whence, it is plain, that my Lord Coke thought, nobody ignorant of the purport ſhould be puniſhed as a publiſher; for the whole fair ſex, the clerk, the ſoldier, and the huſbandman (that is, in other words, all mankind, the church, the gentry, and the labourer) are to be excuſed, if ignorant, by the Judge. Moore makes the Lord Chancellor cloſe all, with ſaying *inveniens libellum famoſum punitur*, (the inventor of an infamous libel is the perſon puniſhed.) Is it therefore poſſible to conceive, that ſuch a Court could pronounce a perſon, who made a copy, without any ill intent, guilty of contriving a libel? No man that reads Moore, and attends to the ſenſe of the word 'writer,' as uſed by him, can doubt of his intending by it the compoſer. How can a mere copier be a contriver? which he affirms, however,

however, of ſuch a writer as he mentions. In ſhort, my Lord Coke gives evidently the true ſenſe of the Court. And it has happened in this, as in moſt other caſes, that a note-taker, who gives the ſenſe of what the Court ſays, and attends to that ſolely, is more to be depended upon than one who aims at taking every word, and minds nothing elſe. A ſhort-hand writer is ſcarcely ever correct in the ſenſe; for, if he does not hear, or ſhould ſlip any one word, he has no clue to go by; and, it is ſcarcely conceivable, in a large auditory, that a word here and there ſhould not be loſt coming from the bench to the bar. Beſides, what is ſo agreeable to good ſenſe, and the nature of juſtice, as for judges to deliver themſelves in the manner repreſented by my Lord Coke, and to reaſon from analogy? The judgment, as given by him, ſeems to be this: "No perſon that is intentionally innocent ought to be convicted in a criminal Court. In this very matter of libel, nobody, who has not ſome hand in the contrivance of a libel, is deemed to be a writer of it; he muſt be either the procurer of its being written, or the perſon procured to write it. So, with reſpect to the publication, it muſt be done *cum felle*, maliciouſly, by ſomebody who knew, that in propagating ſuch a paper or ſtory, he was propagating a libel; it is the intention which characteriſes the act: therefore, if a man ſimply make a copy, (or, in Lord Coke's own words, write a copy) and do not publiſh it to others, the writing of ſuch copy is no publication. However, if one knowing it to be a libel, writes a copy of it, it is ſtrong evidence to induce a Court to believe that he publiſhed it, and will put him upon explaining his intention thereby. In ſhort, to ſum up all, 'every one who ſhall be convicted, ought to be contriver, 'procurer, or publiſher of it, knowing it to be a libel." This is a fair, plain repreſentation of Lamb's caſe, which ſhews it to afford no ground for the determination in the caſe of 'Beare'; but on the contrary, to condemn it. Indeed, this laſt is totally unſupported by precedent, principle of law or reaſon. It claſhes with them all, and goes a length that the Star-chamber was aſhamed of, and diſclaimed. Nay, it is inconſiſtent with itſelf; and it is a ſingle caſe.

In human judicatures, it is impoſſible to aſcertain preciſely the mind and intention of any actor, unleſs he has himſelf declared them, and proof be given of ſuch declaration, but they are to be collected from circumſtances before and after, which muſt be judged of at his trial.

trial. There can be no malice, where there is ignorance. For inſtance, if a raw lad, brought to town as clerk to an attorney, was bid by his maſter to tranſcribe ſuch a paper, and carry it to ſuch a perſon, and this paper were to contain an account of the D. of Grafton or Mr. Bradſhaw, having entered into a treaty for the ſale of ſuch a place under government with ſuch a perſon, by the intervention of ſuch a woman, and ſold it for ſo many thouſand pounds, of which ſuch a portion went to the Duke, and ſuch a one to his Secretary; and this raw clerk had never, in his life, heard before of the Duke or Mr. Bradſhaw, and did not know whether the ſale of ſuch an office was, or was not uſual or improper, and corrupt, or what a libel was, nor conſequently, whether the relation of ſuch a ſtory was a libel or not: would it, if the lad were proſecuted as a libeller, and this ſeemed to be the caſe, be poſſible for any Judge to perſuade me, that I ought to find him guilty of writing a malicious libel, by telling me malicious was a word of courſe; or, would it be poſſible for ſuch Judge, with all his brethren, to perſuade me, that it was a queſtion of law, whether this act of writing was done maliciouſly or not; or that they could judge of it better than myſelf or a Jury; or induce me to believe, that ſuch writer had made a libel, becauſe writing was making, &c. Common ſenſe revolts at the very idea of ſuch ſtuff. And I am ſatisfied, that the noble Duke, or his Secretary, who have both been ſo often, ſo impudently, and ſo falſely miſrepreſented in public and private life, would ſcorn to uphold ſuch impoſitions upon the common underſtandings of mankind. The famous Scotch logical hero, Duns Scotus himſelf, ſurnamed *Doctor Subtilis*, would have ſhrunk from ſuch work. Then, what will Lord Mansfield ſay to it?

It has often been matter of aſtoniſhment with me, how a notion could ever obtain, that whether any paper was a libel or not, was a matter of law, and was therefore, of neceſſity, to be left to the determination of the Judges. Almoſt every opinion has ſome little foundation for it, and, I think, the preſent muſt have ariſen from the Judges having formerly determined the matter. But it could not then be otherwiſe; becauſe the proſecutions for ſtate libels, were always carried on in the Star-chamber, where there was no Jury. And, it is ſelf-conviction to myſelf, that this gave riſe to ſo ſtrange a conceit. In many caſes, much evidence muſt be entered into for explaining a libel,

and

and bringing it home to a particular perſon ; it muſt be ſhewn, that he went among his acquaintance by ſuch a name, although not his own ; that he uſed ſuch a houſe, diverſion, &c. called ſuch a perſon by ſuch a nick-name, and was remarkable for ſuch and ſuch things. If theſe particulars are not proved, by *viva voce* evidence, they muſt be by affidavits or depoſitions, before the Court can determine, whether the paper, print, &c. were a libel or not. Where the Judges proceed without a Jury, ſuch evidence muſt be laid before them ; but, where a Jury is called in, it is their province to determine, whether ſuch a particular perſon be intended, and whether what is ſaid of him be ſcandalous, malicious, &c. that is, in other words, whether the publication be a libel ; for, there is no magical virtue in the term libel, nor any other law in the matter, than what lies in that ſingle word. It is impoſſible to contend, that in all caſes, without evidence of other facts, beſides that of publication, any Court can pronounce the thing complained of to be a libel. This, therefore, proves the falſity of the aſſertion, that nothing more is the ſubject-matter of trial.

Nothing can be more contemptible than the ſaying of Lord Holt, that the writing makes the eſſence of a libel. It is clearly the malicious, or ſeditious intention of it, which is the eſſence of the offence. As in felony there muſt be *felleus animus*, ſo in libels there muſt be a libellous mind. Nay, the tender laws of England will not ſuffer a man to be called in queſtion before a court of vindictive or criminal juſtice, for words merely ſpoken, although reflecting and defamatory, becauſe they may be ſpoken in the hurry of altercation, in ſudden paſſion and anger. The Courts expect that it ſhall appear that there was real rancour and a deliberate intention to defame, and therefore require, before they will take notice of almoſt any words, that they ſhall be committed to paper, which is preſumed to be a ſolemn act, and what ought to render the doer accountable. This is what gave occaſion to wicked men, to pretend that the whole eſſence of a libel conſiſted in the writing. Whereas, if this were ſo in a ſtrict ſenſe, then all writing whatever would be criminal ; but this is too much to contend. It is therefore reſtrained to the writing of libellous matter. Now, for what reaſon is this ? Becauſe there muſt be malice in a thing to make it a libel. But, it does not follow, from there being malice in a writing, that there muſt be ſome in the writer, unleſs he were the compoſer or contriver of ſuch writing.

Then,

Then, if this does not follow of neceſſity, there muſt be ſome proof to induce a belief, that the writer (or printer, if you will) knew the meaning of the writing which he was tranſcribing, or printing, and muſt, therefore have done it with a libellous intention. But, you may reply, that the mere writing, copying, or printing, is a proof of ſuch intention. I allow, that it is *prima facie* evidence, preſumptive proof, and may be urged as ſuch to a Jury, for conſideration. Indeed, it will probably make it not only prudent, but abſolutely requiſite, for the writer or printer, to enter into a defence. To ſhew for example his extreme youth, an ignorance of the drift of the writing, that he did it ſecretly in his own ſtudy, from whence, though locked up in his bureaus it had been ſtolen, and publiſhed without his knowledge; and that he had frequently expreſſed much concern and reſentment about it: or, that he wrote it as a law ſtudent, or ingroſſed it for the clerk of indictments; or was a foreigner, and neither underſtood, nor ever heard, what the purport of the writing was, &c. &c. It may be ſaid, that a public proſecution would never be carried on againſt ſuch a tranſcriber. What, not if it anſwered the purpoſe of any political faction, to oppreſs him, upon a difference of parties? I can tell you, that in ſuch a caſe, a nobleman, a ſecretary of ſtate, would ſtir in it himſelf. How came the world to know any thing of the abandoned blaſphemy in the 'Eſſay on Woman?' Was it from the complainer of the work, or the author? Did they differ in private principles of virtue, or in party only? Was it a deſire of extinguiſhing and ſuppreſſing blaſphemy itſelf, or of ruining a troubleſome man? Was there, or could there be, the leaſt motive from private or public virtue for the whole proceeding? In ſhort, what would diſgrace a man, as a gentleman, for ever, and make one ſhy of any intercourſe with him, will be, as a politician, praiſe-worthy, a proof of good capacity, and an admirable feat. There are many inſtances of malicious proſecutions, both on the ſcore of gratifying private animoſities, and of carrying political purpoſes. The real intention, therefore, of any writer, whether author, or tranſcriber, ſhould be aſcertained to the Jury, before they find him guilty of the charge laid upon him. With reſpect to libels, in moderate times, the man proved to be the printer and publiſher, would find it very difficult to ſhield himſelf from being convicted of having printed and publiſhed with a libellous

bellous intention, that is, of being found generally guilty. He would probably be ſo, the preſumptive evidence being ſtrong againſt him. In warm times, like thoſe in London towards the end of Charles the Second's reign, or in the preſent, it is poſſible that a printer of the wickedeſt, falſeſt, and moſt miſchievous libels, upon the Prince and the very frame of our government, whether under the ſignature of Junius or any other, might be acquitted. There are ſeaſons of epidemical madneſs, when a temperate Jury cannot be had, and when nothing will be deemed a libel upon government. Be it ſo. The diſorder cannot laſt long. At this moment, perhaps, Mr. George Bellas, the boat-ſailing proctor; Mr. Arthur Beardmore, the *magna charta* attorney; Mr. Humphry Cotes, the bankrupt; Mr. Horne, the Brentford curate; Mr. Vaughan, the broker, &c. taking upon themſelves the ſtyle and title of ſupporters of the rights of all Engliſhmen, may have ſome privilege beyond us common men. But theſe extraordinary powers are not delegated for any certain period, and are held merely at the will and pleaſure of the people, and reſolvable in an inſtant by their majeſty. The vortex too, in general, extends no farther than the bills of mortality, and perhaps does not take in ſcandal between man and man, but only between the crown and the public. A late event in a bordering county, may induce one at leaſt to think ſo, where a placeman and a courtier, through the medium of a Jury, has given a very ſmart check indeed to the outrageous, indecent, unprofeſſional pertneſs and calumny of a zealous young man, who might have found a more ſuitable employment for his talents, than the being public orator to factious, popular meetings. The moral of the whole may be very good. But be the reſpective impartiality of Judge and Jury what it will, and it may ſometimes be a queſtion on which ſide it lies, the conſtitution has placed the trial of *all* criminal matters, in the hands of the latter moſt indiſputably, and they are upon oath to find, whether the act complained of was done, and whether wilfully or not. There is ſcarcely any matter of challenge allowed to the Judge, but ſeveral to the Jurors, and many of them may be removed without any reaſon alleged. This ſeems to promiſe as much impartiality as human nature will admit, and abſolute perfection is not attainable, I am afraid, either in Judge or Jury, or any thing elſe. The trial by 'our country' is in my opinion the great bulwark of freedom, and, for certain, the ad-

miration of all foreign writers and nations. The laſt writer of any diſtinguiſhed note upon the principles of government, the celebrated Monteſquieu, is in raptures with this peculiar perfection in the Engliſh policy. From Juries running riot, if I may ſay ſo, and acting wildly at particular ſeaſons, I cannot conclude, like ſome Scottiſh doctors of our law and conſtitution, that their power ſhould be leſſened. This would, to uſe the words of the wiſe, learned, and intrepid Lord chief Juſtice Vaughan, be "a ſtrange, new-fangled concluſion, after a trial ſo "celebrated for many hundreds of years." Whether London Juries will, or will not judge impartially in factious times, I cannot tell; but this I am ſure of, that they are as capable of judging, whether any paper brought before them be publiſhed with a libellous intent, as my Lord Chief Juſtice Mansfield, and his aſſeſſors (able and learned as they are) there being no legal matter whatever in the conſideration.

A libeller is charged with printing and publiſhing ſuch a paper, with ſuch blanks, meaning thereby, certain perſons there deſcribed, with an intent to defame, raiſe ſedition, &c. It is ſaid, the publication and the application of the blanks, are the only facts in queſtion, and that theſe therefore are alone to be ſubmitted to the Jury, for the nature and import of the expreſſions in the paper, whether criminal or innocent, are a matter of law. Should one aſk, however, whether any particular words were neceſſary to make a libel, no, muſt be the anſwer. By the knowledge of what law then is the inference to be made, whether the writing publiſhed be a libel or not? Is it by the law of eſtates in fee ſimple or fee tail, or of perſonal eſtates; or is it by the law of contingent remainders and deviſes, of limitations, purchaſe, grant, or of deodands, waifs and eſtrays, or by the rules of ſpecial pleading? No; it is merely of the intention of the party, or at moſt, whether the writing he has put forth contains inſult, defamation and ſcandal, or tends to raiſe ſedition. Is this all, and is no ſet of words neceſſary, or a ſine qua non? This is the whole. Why really if it be, I ſhould think a Jury of common coffee-houſe politicians in London, could gueſs as ſhrewdly, or tell as certainly, to what every expreſſion alluded, and whether it raiſed a horror, contempt, or ridicule, or elſe vented lies of the adminiſtration, ſtate, or any individual, or diſpoſed people to clamour and be ſeditious, as Mr. Juſtice Gould, or my Lord Chief Baron, even if they could call up to their aſſiſtance

assistance the deceased Mr. Justice Denniſon from the dead, that ſkilful ſpecial pleader. If the words are written or printed, and publiſhed with a malicious or ſeditious intent, they are a libel. This is the term which the lawyers have pitched upon to denominate ſuch a writing, and when this term is once thus explained, the whole law neceſſary for forming a determination whether any writing be a libel or not, is known. It is therefore, the actual uſe and application of the words, which are to be judged of. For what reaſon then, is not a Jury able to make the proper inference, after hearing all the circumſtances of the writing and publication, conſidering the text and context, and all the conſtructions to be ſuggeſted *pro* and *con?* Any words almoſt may be uſed to convey a libel; there are no technical or particular words appropriated to the purpoſe: nor is there any peculiar form of ſentence requiſite. A man may render the ſame words libellous or not, by the application he gives them, whether direct, ironical, or burleſque, in jeſt, or in earneſt. The ſubject is generally political, not legal, and a Jury, particularly a Special Jury, can collect the drift of the writer or publiſher, as well as the ableſt civilian or common lawyer in the land. In many inſtances, if he be a man of the world, much better. The Houſes of Parliament have even taken upon them to do this. In ſhort, the intention is the whole and ſole matter for conſideration; the particular words are of no conſequence. For, cowardice may be attributed to a general, ſervility to a nobleman, and knavery to an ingenious youth, and be no libel; as for example,

"Cobham's a coward, Marchmont is a ſlave,
"And Lyttleton a dark deſigning knave."

A picture or drawing may be a libel, like many we have been favoured with of late days; perhaps ſtone or wood may be wrought into one; and, moſt certainly, Foote's pantomimes and mimickries may be deemed ſo. There is no peculiar legal import, that I know of, in libellous expreſſions, which requires the operoſe ſkill of a conveyancer, draughtſman, or pleader, to ſettle. But, if there was any matter of law in the conſideration, it can only be, whether ſuch words, if proved and ſhewn to be written maliciouſly, are of ſo infamous or hurtful a dye, as to be at all regarded by a Court of Juſtice. This, however,

in an information granted by the Court of King's Bench, (the only one that ſhould be tolerated) is predetermined by their letting it go to trial. If the proceeding be by indictment or information of the Attorney-General, any counſel may object to their not lying for ſuch publication, either before or after the Jury are called, or after trial, if conviction enſue, in arreſt of judgment. But this affords no pretence for ſaying, that the inference of maliciouſneſs or ſeditiouſneſs in the publication, is a matter of law, and to be left as ſuch to the Court. The only thing that has aſtoniſhed me is, how lawyers could have the impudence to make ſuch a pretence, and the world the folly to bear with the mummery of it. Whoever publiſhes, with a deſign to vilify any individual, or the government, is a libeller; but to the inveſtigation, diſcernment and inference of this, the Jury, aided by council and witneſſes, are as competent as the Judge; and it can only be ſatisfactorily made out from evidence in many caſes; and in all is, what the Jury, that is, the defendant's country, can and ſhould decide upon. If the language be French, Spaniſh, or German, or there are ſigns in the picture which are not obvious, both Judge and Jury will probably require help. In reality, the intention with which a man has publiſhed, or made any thing, is a fact, as much as whether he thought of his miſtreſs yeſterday, or trod upon his rival's toes by accident, or with a deſign to affront him; there is, there can be no law in it: nor, of courſe, is there any reaſon why a lawyer ſhould make the due inference as to ſuch deſign, thought or intention, better than a layman. Whether ſuch a principle, or ſuch an idea, was in ſuch a man's head or heart at ſuch a time paſt, is as much a fact, as whether there was ſuch a mole, wen, or cut in his forehead; and there is nothing but plain, good ſenſe, needful for his judging from the diſcourſe, company, friends, connection, intereſt, quarrels, pique and temper of the defendant, taken together, with the common import of the words themſelves, whether the writer publiſhed or not with a libellous intent.

Don't we all know, that in actions for words, which go upon the ſame principle, where ſome words are held to be actionable in themſelves, and others are not ſo, unleſs accompanied with ſpecial damage, even the words, actionable in themſelves, may be ſhewn to have been ſpoken in fun and humour, and ſo to have been underſtood,

ſtood, and not according to their common import, and that evidence of this ſort is conſtantly laid before Juries, and that they acquit in ſuch caſe, notwithſtanding the words were actually ſpoken?

My Lord Vaughan in Buſhel's caſe, ſays, "A Jury-"man ſwears to what he can infer and conclude from the "teſtimony of witneſſes, by the act and force of his un-"derſtanding, to be the fact inquired after. Without a "fact agreed, it is as impoſſible for a Judge, or any "other, to know the law relating to that fact, or direct "concerning it, as to know an accident that has no ſub-"ject. Hence it follows, that the Judge cannot direct "what the law is in any matter controverted, without "firſt knowing the fact. A Jury cannot implicitly give "a verdict by the authority and dictates of another man. "One cannot ſee by another's eye, nor hear by another's "ear; no more can a man conclude, or infer the thing "to be reſolved by another's underſtanding or reaſoning; "and though the verdict be right the Jury give, yet "they being not aſſured it is ſo from their own under-"ſtanding, are forſworn, at leaſt *in foro conſcientiæ*." And how certainly in matter of libel, the intention of the preſumed libeller is ſuppoſed to be inferred by the Jury, may be ſeen from the form of drawing up the verdict on ſuch occaſions, or by looking into that golden treatiſe on the duty of Petty Juries, written by Sir John Hawles, formerly Solicitor General, and an excellent lawyer, called 'The Engliſhman's Right,' which the perſpicuity of the writing, and the ſoundneſs of the reaſoning render ineſtimable. The reader will there find, that in libel, treſpaſs, breach of the peace, and felony, on the iſſue of not guilty, the law ariſes out of, is complicated with, and influences the fact, and muſt therefore be determined by the Jury. But indeed, the variety of findings in murder before-mentioned, prove this undeniably. Not only the fact, but the intention of killing, muſt be proved, of both which the Jury are the ſole Judges; and if they find it was not done premeditately, and of forethought, it is but man-ſlaughter. So if the indictment be for an aſſault, with an intent to kill, or to raviſh, &c. the Jurors muſt collect, infer, and judge of the intent. In the 'King againſt Crook,' the defendant was indicted for forging a deed with an intent to moleſt and diſturb one Garbot, in the poſſeſſion of his freehold, contrary to the ſtatute. The Jury found the defendant guilty, and he moved in arreſt of judgment, which occaſioned ſeveral

arguments

arguments at the bar in different terms; and at laſt, after having taken time to conſider, the Court gave judgment againſt the defendant. Lord Raymond ſaid, "It "is objected, that the Jury cannot determine the in- "tent, but this is not the caſe of a deed or a will; and "what is or is not an intent to do a thing, within the "meaning of an act of parliament, is fit for their de- "termination, becauſe ſuch intent is to be collected from "fact and circumſtances, of which they are the proper "judges." Mr. Juſtice Page ſaid, "*the intent is mat- "ter of fact*, to be tried by a Jury. It is like the caſe of "an indictment for burglary, laying, that a houſe was "broke with an intent to ſteal; ſuch intent is left to the "Jury. Probyn J. (ſince Lord Chief Baron) and Lee "J. (ſince Lord Chief Juſtice) were of the ſame opi- "nion."

When I reflect that the declaration, information, or indictment for a libel, charges the paper complained of with malice and ſedition, that the Jury are ſworn well and truly to try this charge, and true deliverance make, that the defendant, by the forms of law, cannot plead the truth, or any matter whatever in juſtification, and that if the Jury find him guilty, the verdict is drawn up; "The Jurors ſay upon their oaths, that the defendant "maliciouſly and ſeditiouſly publiſhed the paper in queſ- "tion;" it is impoſſible for me not to declare, that the whole of the proceeding, and the only legal form of drawing up both information and verdict, give the lie to thoſe who tell a Jury that "the epithets falſe, ſcandalous, and "malicious, are at preſent (before any verdict finding "the defendant guilty, which eſtabliſhes the fact) all "words of courſe; but if the writing be found a libel, "they are inferences of law," or elſe that "the epithets "of malicious and ſeditious, are inferences in law with "which they have nothing to do, and that whether the "paper be criminal or innocent, is to them a ſubject of "indifference." Indeed, if "nothing can be more va- "rious than the 'manner' of publication, which may "be attended with the higheſt degree of guilt, or with "circumſtances that make it a venial matter;" how can it be ſaid in the ſame breath, that the only "queſtion for "the Jury's determination is, whether the defendant "printed and publiſhed a paper of ſuch tenor and mean- "ing as is charged by the information?" Is not the manner of the publication, if capable of ſuch variation as to be either criminal the higheſt degree, or perfectly venial,

venial, of great importance? Is it not intirely a ſubject of evidence and matter of fact? and if it turn out venial, ought not the Jury to acquit, and true deliverance make? Becauſe the Court can arreſt judgment, *muſt*, or ſhould the Jury, in honour and conſcience, truſt to the Court's doing ſo? But if they ſhould, can the Court itſelf, by any other means than the Jury, come at a knowledge of the manner of publication? And is not this knowledge abſolutely neceſſary to the doing of juſtice? Will a very juſt obſervation of a puny Juſtice (which I read lately in a magazine) that "there is not a law-term more ambiguous than *criminality*," diſpoſe me the more to leave the conſtruction of it to the Court? But, be this as it may, I am ſure if it be true, as above rehearſed, that "before "the finding of the Jury which eſtabliſhes the fact, the "epithets 'malicious,' &c. are words of courſe; but "that if the writing be found a libel, they are inferences "of law," it would be with me an additional argument (were I of the Jury) to be thoroughly ſatisfied that the paper was a libel before I found ſuch a verdict. The wording of this ſentence is not very clear, but if I underſtand aright, the paper's being malicious, or not, depends upon my verdict; 'malicious, ſeditious,' &c. have no meaning at all, until I pronounce the defendant guilty, and that inſtant they leap out of their trance, take the lead, and are the moſt operative of all. They turn the defendant, whom I left innocent, into a devil at once.

No Jury of laymen, I ſuppoſe, would immediately diſcover the juſtice or propriety of ſuch proceeding; nor would it enlighten their minds very much, were they to be additionally told, that "by finding the defendant "guilty of the fact, they do not find he did it with any "degree of malice or guilt, more than appears from the "face of the *publication*." Should they, however, have the curioſity to look at the verdict when drawn up, they would, I believe, be of opinion, that this laſt ſpeech ought to conclude with the word 'information,' to make it true.

For my own particular, I muſt profeſs, that when I heard it ſaid, that the Jury, by finding the defendant guilty of the information, "do not, by that verdict, find "whether the production was legal or illegal," I am at ſome loſs to tell what thoſe words import. Is it, that I am at liberty to find a man guilty, under a criminal proceeding, of what is legal? Surely this cannot be! If the law is to ariſe out of the fact, the Judge ſhould inſtruct

me,

me, that if the fact turns out in such a way, it is legal, if otherwise, illegal, and that I must find accordingly. It would strike me, as an absurdity, to be told, in trying a man for a crime, and as a criminal, that whether what he did was criminal or innocent, legal or illegal, it was all one to me, and my verdict ought not to be influenced by any such considerations. This can only be supported by the nonsense of calling abuse upon an individual, or upon government, a matter of law, instead of a matter of fact, or the sense of malice or sedition, the sense of a lawyer, and not of a layman, which is the consummation of all absurdity, confusion, and jargon. But, should any man of the long robe, nevertheless persist, "it having "been always his practice," to denominate malice and sedition law, and the understanding of malicious and seditious writings, the understanding of matters of law, I should not, for ever, contradict him. However, should he proceed with a religious, a threatening, or a jesuitical air, or with a mixture of all, to tell me, when on a Jury, that "if I chose to determine the point of law, "I should be very sure, for my conscience sake, that "my determination was law; and that if the law "was in every case to be determined by Juries, the "country would be in a miserable condition," I should be apt to answer, that in all criminal matters where law was blended with fact, Juries, after receiving the instruction of the Judge, must determine the whole, by finding the defendant generally guilty or not guilty, and that such a complete verdict I would more especially give in matter of libel, because I took myself to be as good a judge, whether any thing was written or done maliciously or seditiously, as any lawyer whatever, and there was nothing but this to be judged of, which he may call law, but I never should. And perhaps I might subjoin, that as to the pernicious consequences of Juries, taking upon them to determine in every case what the law was, no such thing could happen, unless he and his brethren were to unite in abolishing special pleading, and of course demurrers, by making every thing triable on a general issue, and then something like it might happen; and this, perhaps, was worthy some consideration before the evil had spread too far.

Supposing, however, that a Jury, finding no special verdict, should not find a general verdict in the usual phrase,

phraſe, guilty or not guilty, as they ought to do, but in ſome other words, ſuch words muſt certainly be entered on the record, if the Judge accepts them. Where their meaning is dubious or incomplete, the Judge may refuſe to accept them, and it muſt always be his fault, if any uncertain verdict be taken. It is his duty to point out to them the defect, whatever it be, and to make them explain themſelves, or to ſend them back for further conſideration. Should he perceive, that their deſign is to acquit the defendant of the criminality, but that their expreſſions will not anſwer their end, and be deemed, in legal ſenſe, to find him guilty, he is bound, both in duty and conſcience, to inform them ſo, and to let them know what would be the proper way of compaſſing their purpoſe. If corruption can be proved, they are ſubject to an attaint; otherwiſe, their own conſciences muſt anſwer for it, whenever they conſpire to give a verdict unjuſtly. They ſhould not be permitted, in any caſe, to ſkulk under ambiguous or indirect terms, but be forced to be explicit. On the other hand, neither delicacy nor fear, much leſs any ſiniſter purpoſe, ſhould induce any Judge to receive words ,that wanted explanation, or were capable of two ſenſes, or were improper to be put upon record. Deceit, indeed, in the ſolemn execution of juſtice, and of this celebrated part of the Engliſh judicature, cannot be ſurmiſed. In converſation, it is reckoned diſingenuous and unfair, to put a different ſenſe upon a man's words from what he intended, and, in the tranſaction of buſineſs, nothing diſcredits a gentleman ſo much as equivocation and fallacy of expreſſion. But this, when practiſed by a Judge, is a perverſion of right, a violation of his oath, corruption in his office, an offence againſt the ſtate, and a proper ground for an addreſs to both Houſes, to remove him from the ſeat of judgment. Both the Judge who tries the cauſe, and the Court of King's-Bench, are obliged, by our conſtitution, to take the verdict according to the real meaning of the Jury, becauſe it is to be their's and not the Court's. Both are ſworn to a faithful execution of their ſeveral truſts; there ſhould be no juggle in the matter; there can be none (without a forſwearing) on either part. Where the Judge, therefore, verily believes, that the

Jury intended to acquit the defendant of any malice or ſedition, whether his own opinion coincides with their's or not, he is bound to take and expound their verdict accordingly, and not to reaſon artificially, from what he may have ſaid in ſumming up, or from the nature of the iſſue itſelf, according to his legal notion of it, as to what they muſt have ſaid, and from thence conclude, to what they did ſay; as, for example, that "the Jury "did not mean to find the malice of the defendant, be- "cauſe it was not within their enquiry; nor did they "mean to execute it, becauſe it was not within their "power to exclude a legal deduction." Such kind of reaſoning, in an anſwer, would, as my Lord Mansfield knows, be called in the Court of Chancery, fencing with the queſtion. It is anſwering with a reference to another thing, in the truth and falſehood of which, its own muſt reſpectively depend, and therefore is deemed no anſwer at all. In the preſent ſubject-matter, it is more eſpecially liable to exception, becauſe myſelf, and very many others, are fixed in opinion, that the malice is not only within, but the true object of, the Jury's enquiry; and that the inference of it is no more a legal, than it is a philoſophical or a popular deduction. Come forth, therefore, and anſwer directly, whether you do or do not believe, that the Jury intended to exclude the malice? yea or nay? But—you know too well, how unexceptionable, how ſatisfactory a categorical declaration always is, not to have given ſuch a one, could you have given it with truth. *Dum tacet*, therefore *clamas*.

The provinces of Judge and Jury are diſtinct and incompatible. And, on all pleas of not guilty, the Jury muſt determine both law and fact, from the nature of the thing, as well as by uſage immemorial, that is, muſt decide whether the defendant be guilty or not. If nothing is found againſt him, or if nothing criminal is found againſt him, he muſt be acquitted. There can be no amendment or alteration of their verdict by the Court: it can only be by themſelves before being diſimpanelled. My Lord Ch. J. *Hale* ſays, "If the "Jurors by miſtake or partiality, give their verdict "in court, yet they may rectify their verdict before it is "recorded, or by advice of the Court go together a- "gain and conſider better of it, and alter what they have "delivered.

" delivered. But, if the verdict be recorded, they can-
" not retract or alter it." A Jury may be bid to explain their verdict, but the proper time for this is, when they deliver their verdict, although before their diſcharge from that particular cauſe, it may at any time be done; but that period paſſed, the thing is impracticable ever after. In a will, the intention of the teſtator, and not the legal import of the words (it is now ſaid) is to be taken. But this muſt hold much ſtronger with a verdict. Now, every amendment in phraſeology, or new-wording, is an alteration, and as no Court can alter the finding, the thing in its own nature is more ſuſpicious than new-dreſſing bail, which always looks like a cover for deceit. After the Jury be once diſcharged, nothing can be done that may affect their verdict. The ſubſtance is on all hands agreed to be ſacred; and by varying the leaſt expreſſion, you may change the ſenſe, and give another turn to the whole. Therefore no riſque of the kind is to be run. If a verdict as brought in, has no legal import, it ſhould not be received; but if from ſleepineſs, oſcitancy, hurry, or fright, ſuch a verdict, or one that is capable of two ſenſes, be received, and the Jury be diſcharged before any explanation had, it cannot be amended afterwards by the Judge, or by the court, in order make it what they think, from their own way of reaſoning, it ſhould have been, under a pretence of conferring upon it what they call a legal import. Where the real verdict has at firſt been truly taken, it cannot be amended, however defective it may be in itſelf. The Jurors after being diſimpanelled, cannot be called, or be permitted to explain, and much leſs to alter, or add to the verdict which they had delivered, when impanelled. There can be nothing therefore to aſcertain or amend the verdict by.

This was not attempted, or ſo much as dreamt of, in the violent caſe of 'Beare.' The Judges of theſe days knew that as it had been received, ſo it muſt ſtand. No council ventured to move the Court for the purpoſe. So far from directing any motion for entering up the verdict according to the legal import of the words, I am convinced that Lord Holt was too wary and wiſe to have let ſuch a thing be ſhewn cauſe upon before him. The imputation of altering verdicts, after once received by a Judge, and the Jury diſcharged, he would not incur; indeed it

would have been to accuſe ſuch Judge of inſufficiency, and to ſubject himſelf to the odium of varying, perverting, and corrupting verdicts, in order to ſerve court-purpoſes. The Judge would have been charged with having deceitfully and unduly received a verdict in improper and informal words, on purpoſe to entrap the Jury, and to afford a pretence for changing their finding afterwards; and thereby altering the ſenſe and meaning of it. They would have recollected my Lord Hale's ſaying, "If the Judge's opinion muſt rule the matter of fact, the trial by Jury would be uſeleſs;" and they would certainly have accuſed the Judge of having betrayed and impoſed upon the Jurors, for that he otherwiſe would have refuſed to take the verdict as given at the time, and told the reaſon why Holt, bold as he was, did not care to ſtand this, although he was not the Judge who tried the cauſe, and therefore not ſo directly obnoxious to complaint as he would have been, had that been the caſe. Beſides, that verdict was drawn up in Latin, though delivered for certain in Engliſh, which would have afforded much ſhelter, and have begot many learned arguments to prove that the clerk could alone have been miſtaken; but even this additional field for controverſy would not induce the old chief to hazard the battle.

The permiſſion to a Jury to rectify or alter their own finding, or to declare againſt it by affidavit, after they have once been at large, and mixed with the world, would be of the moſt dangerous conſequence; it has rarely been aſked, and ought never to be granted. The idea is novel, and contrary to the fundamental principles both of law and policy. But the application to Jurors, after being diſcharged, to hear privately, and *ex parte*, other evidence, and to make affidavits in conſequence thereof, either to alter the whole or any part of their verdict, or to explain it, or to expreſs a ſorrow for having given it, is infamous, and the greateſt inlet to iniquity, corruption, perjury, and injuſtice, that can be deviſed; and therefore thoſe who make ſuch applications, when diſcovered, ſhould be proſecuted at the public expence, fined, and branded for ever. Every practice of this ſort, tends to leſſen the force and effect of the public judicature of the country, and counteracts the guards with which the law, for wiſe reaſons, has beſet Juries, by having them ſhut up immediately, after being ſworn, and no perſon whatever admitted to ſpeak to them, leſt ſome popular talk,

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or external influence, ſome clandeſtine bias, or partial repreſentation or intreaty, ſhould take place. Whenever any thing of the kind has in fact happened, for want of the bailiffs and parties conſtant obſervation, it has, if made appear, been deemed to contaminate their verdict ſo as to ſet it aſide. All the Jurors ſwearing that nothing had paſſed relative to the cauſe, would not uphold it. Thoſe who ſet about a private examination, eſpecially of one ſide, after a public trial had, in order to ſtagger a Jury, and to render them diſſatisfied with their verdict, act in the groſſeſt defiance of the law, and with the moſt audacious contempt of the Court they intend to affect or influence by it. It is embracery and tampering with Jurors, in order to defeat their own verdict. "Even if after the "Jury be ſworn and gone from the bar, they ſend for a "witneſs to repeat his evidence, that he gave openly in "Court, who does it accordingly, and this appear by "examination in Court, and indorſed upon the record, "or *poſtea*, it will avoid the verdict."

The inqueſt of ſurgeons, made in a caſe ſome time ago, being looked upon as calculated to diſcredit the finding of a Sworn Jury which had paſſed under the direction and eyes of two or three Judges, gave a general alarm, and yet it took riſe from a merciful diſpoſition, and was perhaps, in the manner of it, as venial as any thing of the kind could be, and was certainly not intended to queſtion in the leaſt, the propriety of that verdict, or of the trial upon the evidence then before the Court. But it ſerves to ſhew of how ſacred a nature a verdict is.

This made me almoſt doubt the other day, what I read in the Political Regiſter as a fact, that the Court of King's Bench on the part of the Crown, was moved for a rule to ſhew cauſe "why the verdict in the 'King againſt "Woodfall' ſhould not be entered up, according to the "legal import of the words." But upon enquiry at the laſt aſſizes, of a young man juſt called to the bar, who goes the home circuit, I found there had been ſome ſuch motion. However, he added a circumſtance, which I fancy he muſt be miſtaken in (as young men frequently are, who do not regularly attend, and are in the boxes about the Court) that he heard the grand juſticiary in a ſide ſpeech, but loud enough to be heard, even by the bar, ſay to one of his brethren, when cauſe was ſhewn, and towards the concluſion of the matter "that the thing had been decided, 'the King againſt "Beare' was in point" or words of that effect. Whether

ther this be preciſely fact or not, it will afford ſome apology for my dwelling ſo long upon that caſe, out of reſpect for what ſo extraordinary a perſonage may be only ſuppoſed to have uttered in favour of it. But upon ſuch a caſe, I muſt ſay to ground a general rule for doing what hitherto has not been done, is giving great weight to it indeed. Shall it then be a word of courſe for the future in libel, (for I will not carry it, as perhaps not intended, to any other matter) to change the lay-verdict into a legal one? Lord Holt merely conſtrued, in a legal ſenſe, what a common Jury had ſaid, but this motion goes on ſtill farther, and is to change it *ipſo facto* into legal words, which will have this additional effect, that it will take away all poſſibility of the Lords reviewing ſuch ſentence.

The only amendment ever thought of before was, where the clerk had blundered, and not entered the verdict as it was given. In ſuch caſe, his error ought not, it was thought, to be a prejudice to any body; and therefore ought to be ſet right. This is not altering a Jury's verdict, but is done expreſsly to prevent its being altered by the miſpriſion of ſome officer of the Court. In this particular we all concur with my Lord Mansfield, who (according to my magazine) declared, that "in the caſe of "Gibſon for forgery, all the Judges were of opinion, that "where the 'officer' had drawn up the verdict, 'con-"trary' to the finding of the Jury, it might be amended;" that is, made agreeable to the fact. But my monthly informer, does not go on and ſay, whether his Lordſhip took notice, that this was in the caſe of a profeſſed ſpecial verdict, which circumſtance, may make ſome little difference in the matter. Indeed I apprehend, that the Judge who tried Woodfall, and the Court of King's Bench, as well as council for the Crown, have clearly intimated their opinion, that the verdict here is not ſpecial, without declaring, however, expreſly, whether it be or be not a general verdict, or elſe, ſomething between the two, that is, neither the one nor the other, but biform, and, as it were, of the compoſite order. And, as the Court hath not as yet pronounced its deliberate opinion, it may not, perhaps, be in me an unpardonable preſumption to opine, that it is really of a mixed nature. It is not completely a ſpecial verdict, becauſe it does not find every fact in the cauſe definitely and diſtinctly, nor negative expreſly what it does not find; but it partakes ſo far of the nature of a ſpecial verdict, as to find, ſpecially and completely,

pletely, whatever it does find; and, for preventing any ſuppoſition or conſtruction to the contrary, has anxiouſly, and from ſuperabundant caution, inſerted the excluſive word 'only,' to act with the force of a negative upon every conceivable addition. They might either do this, becauſe they found no evidence to warrant their finding more; or, becauſe they ſaw ground to exclude every thing elſe. But whatever was their motive, the fact is, that they have negatived all but the printing and publiſhing, both the innuendoes about the blanks, and the ſedition and malice, if not expreſsly, yet by neceſſary implication, which amounts to the ſame thing. In this caſe, indeed, it happens, that there can but two other circumſtances be ſaid to be laid in the charge, which are the innuendoes and the malice: therefore the excluſive word 'only,' is preciſely levelled at theſe. It can have no other application, and is improper, unleſs intended to ſignify that they were conſidered but repudiated and rejected, there being no pretence for finding them. And this is what the Jury ſwear. Notwithſtanding they were told, (according to practice, it ſeems) that they had nothing to do with any thing but the fact of publication; yet it appeared ſo clearly to them, that there was no ſedition or malice accompanying the impreſſion and publication, that they could not, whether it were a work of ſupererogation or not, refrain from ſhewing, that in their opinion, there was no ground for ſuch charge. This, indeed, is plain, from another conſideration, which is, that every common Juryman knows what it is to find any defendant generally guilty, and therefore, had the preſent Jury thought that, in conſcience, they ought to have found Woodfall guilty of the whole charge, they certainly would have found the uſual verdict of guilty, without ſaying more; and there is but one aſſignable reaſon for their having done ſo, which is, that they did not believe it, and this they have manifeſted by as pregnant a word as any in the whole Engliſh language.

Suppoſe a man, upon being very ill, after eating beef-ſteaks with oyſter-ſauce ſhould take ten guineas from a friend, in order to pay him one hundred, whenever he ſhould again eat beef ſteaks with oyſter-ſauce, and to ſecure the payment of the money upon that event, ſhould depoſit it in the hands of a truſtee. The matter comes into Chancery, and an iſſue is directed to try the fact. The jury find, that he had eat beef ſtakes only, and will find nothing elſe. Would any lawyer contend, that the

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oyſters being only ſauce to the beef ſteaks, was a matter of courſe, and the Jury, by finding the defendant had eat beef ſteaks, had virtually, and according to legal import, found a verdict againſt the defendant, and that he had forfeited his wager? Now, I look upon malice as the ſauce, at leaſt, to the publication of a libel, and abſolutely neceſſary to make the information reliſh, and be good for aught, and not idle garniſh upon the brims of the diſh.

My Lord Chief Juſtice Hale ſays, "the Jury may find "a ſpecial verdict, or may find the defendant guilty of "part, and not guilty of the reſt; or may find the defen-"dant guilty of the fact, but vary in the manner. If a "man be indicted for burglary, *quod felonice & bur-"glariter capit & aſportavit*, the Jury may find him guil-"ty (felonice) of the ſimple felony, and acquit him of the "burglary (the burglariter.) So if a man be indicted of "robbery with putting the party in fear, the Jury may "find him guilty of the felony, but not guilty of the "robbery. The like where the indictment is *clam et ſe-"crete a perſona*, &c." And this great conſtitutional lawyer concludes with ſaying, as to giving judgment on verdicts, where there is any ſpecial finding, *tutius erratur ex parte mi iori.*

Where a man has been charged with ſeditiouſly and maliciouſly printing and publiſhing 'only,' and with nothing elſe, if the Jury have found him guilty of 'prin-'ting and publiſhing only,' it cannot be ſaid they have found him guilty of 'printing and publiſhing ſeditiouſly and maliciouſly,' nor that they have found him 'guilty 'generally' of the charge. The propoſitions are not convertable, and when that is the caſe, nothing but a material alteration, a change of the ſenſe, and real import of one of them, can render them ſo. Beſides, 'only' confines the finding to the one thing ſpecified, the printing and publiſhing, and conſequently leaves unfound, and excludes the reſidue, the innuendoes, ſedition and malice. Nobody indeed denies, that 'only' is a word of reſtraint; the council for the crown allow it to be ſo in grammar, logic, and common ſenſe; but they nevertheleſs contend, that in law it loſes this effect, and reſtrains nothing, or elſe is ſurpluſage; that they are at liberty to conſtrue the finding of the Jury, although not a member of the ſaid Jury was a lawyer, according to the legal import of the words, as if they were all lawyers; and finally, that what is contrary to grammar, logic,

and

and common ſenſe, is good law. This is the ſtrength, as I apprehend, of their argument, and it might, perhaps, have ſome weight before an Iriſh tribunal; but, as I take it, amid all the ſcandal of the times, an Iriſh head has never been imputed to the Court where this muſt be decided, and therefore I am not much afraid upon that ſcore. It was, I preſume, out of decency to the principal law officers of the crown, and for no other reaſon, that this new experiment was not treated with immediate contempt; for I can hardly bring myſelf to believe, that in this liberal ſeaſon it can be given way to, when wills, though reduced into writing, and poſſibly by a lawyer, are expounded according to the intention of the teſtator, contrary to the agreed legal import of his words, and to former determinations of ſimilar caſes upon that principle, although this was the reaſon, in all probability, for leaving wills, like deeds, to the determination of the Court, and not of a Jury, as well as the judicatures being originally eccleſiaſtical, and proceeding according to the civil law. The ſame ſpirit of liberality that has got the better of the legal import of the words in the latter (notwithſtanding a former caſe or two to the contrary) will, I truſt, do the ſame by the other import, ſhould there even be a dark caſe or two produced in ſupport of the preſent motion. 'Common ſenſe' will, as we have ſeen, prevail againſt black letter, where the party whoſe act is to be affected, never heard of ſuch black letter. In truth the meddling with a verdict in England, is yet a very tickliſh thing; for being the opinion of the country, expreſſed by themſelves in their native language, every body will aſſume the right of uuderſtanding it as well as the King's Attorney or Solicitor General, Judge, or Chief Juſtice. All the learned council for the crown, it ſeems, concurred in opinion, that the Court of King's Bench muſt be moved for leave to enter up the verdict according to the legal import of the words. The very motion therefore is of itſelf a demonſtrative proof that all who adviſed, aſſented, or gave way to it, were convinced that the verdict as it ſtands, is inſufficient for judgment being given upon it againſt the defendant, ſo that the Court muſt either rectify the verdict, that is, permit or direct another verdict to be made, or make one themſelves, (what an impudent and troubleſome requeſt?) or elſe the defendant muſt be acquitted. Had not theſe crown lawyers been thoroughly aſſured that the verdict was inſufficient for their purpoſe, they would certainly

have moved for judgment upon it, becauſe the latter motion would not by any means have carried ſo indecent an imputation with it as the former; which plainly implies, that the Judge who tried the cauſe, had taken an inſufficient verdict, and therefore inſinuates either inattention or inſufficiency in him in the function of his legal office. And the matter is really ſo managed, that whatever be now done, it will be liable to ſtrange difficulties, ſurmizes and miſconſtructions. If the Court grant the motion, it will admit that the verdict in fact taken, was inſufficient for judgment and puniſhment by law, and that they muſt make it ſo; for, as was obſerved (according to my magazine) by Serjeant Glynn, if the motion be carried, it muſt be followed with another on the behalf of the clerk, whoſe buſineſs it will be to enter the verdict, to know what the legal import of the words taken is, a thing he will not take upon himſelf for certain to decide. It will likewiſe be ſaid, as the ſame learned advocate urged, that this method was taken to prevent the re-judgment of the matter by a ſuperior Court, becauſe the effect of the motion is to prevent the real words taken as the verdict from appearing upon the record. And the world will aſk why was this done, if the verdict taken was a good one? Would not the Court of appeal know its legal import, as well the inferior Court? It looks as if this laſt was afraid of having proceedings reviewed, imagining they would not ſtand the teſt. After one wrong thing done, is not this the doing of another to protect it? The bold Engliſh whig Chief Juſtice, left himſelf, at leaſt, open to appeal and reviſion. Is this becoming a Court of Juſtice? On the other hand, if the motion be denied, it will be ſaid to have been denied for the ſake of ſupporting the reputation of the Judge who took this queſtionable verdict; and if judgment be given upon it, as it now ſtands againſt the defendant, not only the ſame arguments will be inſiſted on, that have been urged againſt the ſenſeleſs, lawleſs caſe of 'Beare,' but many more; as the preſent caſe is, for reaſons before mentioned, by far leſs ſupportable than that. Who can ſtop the tongues of people in theſe licentious days, from obſerving that Lord Holt gave judgment againſt a man as a ſeditious libeller, upon a verdict taken before another Judge, where many other charges were made; but that his ſucceſſor had given judgment againſt a man as a ſeditious libeller, upon a

verdict

verdict taken by himſelf, where no other charge was laid, and were the word, only, muſt operate upon, and be applied to this. Should the puny Juſtices determine the motion without their chief, it would make no alteration in the voice of the public, no more than if a caſe were made and ſent into the adjoining Court of Chancery for the opinion of the preſent Commiſſioners of the Great Seal; ſo thin now is the partition between the two Courts, ſuch is the ſpirit of party of ſuppoſed influence, and of faction. Nobody like myſelf, merely as *amicus curiæ*, (apply the word as you may) will take the trouble *pro bono publico*, to fling out their thoughts upon ſuch a captious ſubject, purely by way of precaution, before any irretrievable ſtep be taken.

This is, I know, very tender ground to tread upon, as well as ſome other that borders upon it, but there are certain occaſions when one cannot help looking upon every little incident as worthy the conſideration of thoſe in the moſt exalted ſphere of life. Theſe occaſions are, when any popular diſtemper and diſſatisfaction is ſpreading upon a general belief that the capital province of Engliſh Juries is invaded, and ſtep by ſtep to be taken from them, under various artful pretences of improving the conſtitution, and of better ſecuring good men againſt the violences of the bad. You know that

——————————Things light as air,
Are, to the jealous, confirmations ſtrong.

On which account, I think it my duty, as a citizen at large, and long retreated from the buſtle of the bar and the ſtate, to mention whatever in my apprehenſion may give the leaſt ground for calumny; whether the thing be true or not, is of no great moment, if it be circulated as a truth, and indiſpoſes men to that reverence for the decrees of Courts, which I ever wiſh to ſee prevail, as from my heart believing it to be of the utmoſt conſequence to the preſervation of liberty. The purity of the Bench conſiſts in impartiality, wherefore Judges ſhould, if poſſible, (like Cæſar's wife) be free, even from ſuſpicion. It behoves them, therefore, to be wonderfully circumſpect in all popular cauſes. Now, there is a rumour (credat Judæus Apella, haud ego) that in the courſe of the famous motion, which has been the true ground of this letter, ſomething ſlid

from the Bench to the Bar like this; " it muſt be " granted in all events by the defendant's council, " that the verdict as it ſtood, hath found the defen- " dant guilty of printing and publiſhing the paper, in " the information, after filling up the blanks;" and that on this hint, the council took a ground which none of them had either thought of before, or elſe cared to venture upon. But, I confeſs, I doubt my informant's correctneſs, as to the argument itſelf; and much more as to the ſource of it. The latter muſt ſurely be miſtaken, for I never recollect myſelf any paſſage in the leaſt like it; and, if there be no foundation for ſaying ſo, the inſinuation is as indecent towards the object of it as the motion, and more it cannot be. I dare engage, the noble Judge who tried the cauſe, will not, upon his honour, aver, that he aſk- ted " the Jury upon bringing in their verdict," whether the blanks in the original had been truly filled up; and, if he did not, how can he or any one now ſup- ply, preſume, and take for granted, ſo material a part of the finding? We are not to conclude it from the Jury's being told in ſumming up, that this was a part of their conſideration, and what they muſt attend to. They were, I ſuſpect, told at that time, many things which there is great reaſon to ſuppoſe they paved no obedience to. But, however that was, we are not to reaſon from what ſhould have been done to what was done, and to make verdicts by argument. Any verdict, ever ſo deficient, may be made good at that rate, and a fact not found be created in a trice. If the Judges of the King's-Bench, when Mr. Wilkes, known, by perſon, to all of them, preſented himſelf before them, profeſſed that he was the John Wilkes outlawed, and deſired to ſurrender himſelf, ſtared, looked ſurprized, and at laſt declared, they could not know nor take notice of him, unleſs he were brought into Court by legal proceſs; and therefore let him depart from the bar of public juſtice, as quietly as any of the crowd of amazed ſpectators, though an outlaw ex profeſſo, and of the firſt magnitude, for blaſpheming God, and li- belling his King; ſurely none of thoſe Judges, whilſt they retain the ſame head and way of thinking, will ſuf- fer any fact relative to a libeller to come before them, in any other than its true legal habit, according to form of law. They will ſay, very candidly, as in the inſtance

inſtance laſt put, it may be ſo, but they are not obliged to know it. Indeed, the example cited, ſhews ſuch a rigid requiſition of legal mode and figure, that were Woodfall himſelf, in 'propria perſona,' to come to the bar of the King's-Bench, and avow, that he did mean by the blanks the perſons inuendoed by the information, I much doubt, whether ſo ſcrupulous a Bench would not ſay, we can take no notice of your viva voce declaration, there is a legal way for ſuch a fact coming before us, which is the verdict, and we cannot take notice of any thing that was in iſſue in the cauſe, and is not there found by the Jury; it was their province to find it directly if they believe ſo. This holds now more eſpecially, as the verdict here is not the common general verdict, but a particular or ſpecial finding, and the Jurors have, as we obſerve, found that you only printed and publiſhed the paper, without ſaying what they found to be the import of the blanks, which it contained; and, as they have confined their finding to the mere printing and publication of the paper produced, which paper is with blanks, they have really excluded all of the charge which relates to the innuendoes and to the intention of the publication, and theſe being both facts alledged before them by the information and not found, but on the contrary excluded, we muſt take it in form of law and as judges, that they were not true. We can take no notice at all of what you ſay, not being in cuſtody and regularly brought before us.

They might in truth have added, in the words of Lord Chief Juſtice Vaughan, " it remains, if they be " found at all, they muſt be found by inference and " arguments only. And as for that, though it were a " general verdict, the finding the point in iſſue, by " way of argument or inference, for the plaintiff or de- " fendant, is never permitted, not, though the argu- " ment be neceſſary and concluding. I confeſs, that " ſtrictneſs is not rigidly obſerved in a ſpecial verdict, " where the Jury find only the matter of fact, as " when in a general verdict they find both fact and " law, that is, the whole matter in iſſue. Yet in " a ſpecial verdict they muſt find the fact clear " and without equivocation to common intent, elſe " they find nothing whereupon the Court can deter- " mine what the law is. There are no words in this " ſpecial verdict that can be ſtrained to a finding of

" theſe

" theſe (innuendoes for example) by way of inference " and concluſion. It cannot be made out by any in- " ference that they have found them. For to find " that ſuch a letter was written, or ſuch a book made " by I. S. is not to find that all things, or any thing " contained or mentioned in that book or letter, are or " is true *."

It is in print that the council for the defendants wanted to read affidavits from ſome of the Jurors to explain their verdict, and that the Chief Juſtice immediately took up the matter, and ſaid " though " the Court would not yet determine, whether the affi- " davit of any of the Jurymen may be read, yet I have " permitted 'one to be read a little by way of ſtating " it,' and I there find that the application of the in- " nuendoes is not denied, only the criminal conſtruc- " tion put upon the paper in the information. To have " denied the one, would have been very material, " with the other they have nothing to do. In that caſe, " there would be no proof to them of the paper, as " charged in the information. But, if the Jury find " that the defendant publiſhed at all, they find the pa- " per, as charged in the information, for that is their on- " ly enquiry. I take it from the affidavit which has been " ſtated, that it does not appear, whether the Jury " meant to ſay the paper is no libel; if they had the " leaſt doubt whether the innuendoes were properly ſup- " plied, there ſhould be a new trial. I ſummed up to " them, that if they were not ſatisfied of the fact of " publication, or had a doubt of the application of any " of the words in the information to the blanks in " the letter, they muſt acquit the defendant." And in ſome magazine (for all theſe things come into the coun- try) it is ſaid that upon one of the Judges aſking " Whe- " ther any Juryman would take upon him to ſwear " the K—g does not mean King, &c." Lord Mans- field ſaid, " if any member of the Jury was to make " ſuch an affidavit, it would in a particular manner " merit the conſideration of the Court." And that the learned coadjutor, before-mentioned, thereupon added, " the Jury are elected, tried, and ſworn to determine " concerning the matters contained in the information, " therefore if they find any fact of publication, " they muſt find, not the ſimple fact of publiſhing

* Vaughan's Rep. 75, 76.

" that

" that Public Advertiſer, ſold at the defendant's houſe, " but that very libel charged in the information."

Before I conſider what auxiliary argument may be drawn from this new ſpring, I cannot help ſaying, that I doubt the fidelity of the relation, as there are ſome things in it which I cannot well reconcile to prudence or practice, and others which I do not apprehend the force of. The reaſoning moſt evidently is of a very different complection from that of my Lord Vaughan, whoſe acuteneſs as a reaſoner, whoſe learning as a lawyer, and whoſe integrity as a man have rarely been equalled, and perhaps never exceeded. He was withal a royaliſt, and a Chief Juſtice made by Charles II.

If it coſt Lord Holt much pains to get quit of Lord Coke, I think there muſt be no ſmall dexterity uſed to free the preſent caſe of Woodfall from being ruled by the authority of Vaughan. Can any man of common ſenſe and honour ſay, that the Jury have now by their ſpecial finding, found the fact of publication, and the application of the words in the information to the blanks in the letter (and if either of them be doubtful, the defendant ſhould have been acquitted, according to Lord Mansfield) ' clear and without equivocation, to ' a common intent?' I put it as ſpecial finding, becauſe that is the ſtrongeſt way of putting it, for, ' if it were ' a general verdict, the finding the point in iſſue' (which Lord Mansfield agrees the blanks to be) ' by ' way of argument or inference, is never permitted, not ' though the argument be neceſſary and concluding.' And this is the law even in a civil caſe.

It is not therefore material to examine, " whether " there may be ſomething of a diſtinction in the books " about mending a verdict in a civil and in a criminal " caſe;" and if there be, whether " it is a miſtake " and there is nothing in it;" or whether it be a ſound and a legal diſtinction. For, in the preſent caſe, there is no doubt that the real verdict was truly taken, by the chief juſtice himſelf, as I apprehend, and not by the ordinary officer of the court. There is no miſpriſion at all. The verdict has not been taken ' contrary' to the finding of the jury: whether indeed it will be ordered to be ſo drawn up, we ſhall know by and by, ſome time in the wintry, political ſeaſon of the year.

If I recollect right, the old rule was, that jurors, after mixing with the world, ſhould not be received to explain

plain their verdict at all, for fear of ſome undue practice with them. Affidavits from a Jury were always rejected. Should a new trial be moved for or granted, both the motion and the allowance were derived from ſome other ſource. Now, if the 'magazine' relation be authentic, I ſhould be glad to be informed whether this old rule, being become too feeble from age to do its duty, lies under ſome temporal diſability, or has been diſmiſſed and ſuperſeded by any other, and what new regulation? For from the account I cannot tell whether the affidavits were admitted or rejected; nor whether their future admiſſion or rejection is to depend upon the diſcretion of the court, or to be aſcertained by any poſitive rule? It ſeems as if much might be argued both ways from the interlude (I beg pardon, the interlocutory ſcene I would ſay) which has been lately exhibited and which will I hope be attended with ſome benefit to the bar in time to come.

The defendant's council, I agree and laugh when I think of it, who produced and tendered the affidavits, have been very cleverly taken in. They were not permitted to read them in ſupport of the points they meant to put their client's defence upon, 'as the court would 'not yet determine whether they might be read;' but, the chief juſtice in order to know the general purport of ſuch affidavits, directed 'a little to be read by way of 'ſtating' for the ſatisfaction of the court. When this was done, he perceived that the application of the innuendoes was not denied, but that the criminal conſtruction, put upon the paper by the information, was. Whereupon he pronounced theſe two matters to be quite independent of each other, and then concluded, from the ſilence about the innuendoes, that the jurors could not deny their truth, nay he went farther, and conſtrued their very ſilence into an actual admiſſion of it. Never perhaps was there an abler manœuvre. And ſuch is the legal effect of reading a little by way of ſtating. The wicked party (which is a main thing) can never make uſe of it at all, and yet the court, or crown, may ſtrike out light enough from thence, to be able to ſee evidently a fact that was hid in abſolute obſcurity before, or in a word may verify or diſprove any thing they pleaſe by it.

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With reſpect to his Lordſhip's ſpeech, it is not a haſty, but manifeſtly a deliberate compoſition; and yet (pardon me for the remark) there are three material terms in it which ſeem not perfectly free from equivocation, namely, 'criminal conſtruction, libel, and as charged.' However a little conſideration lets one ſee that this happened by accident; and that the firſt and laſt muſt mean the ſame thing, and that 'as charged' comprizes the fact of publication, the truth of the innuendoes, and the libellous intent, the three ingredients neceſſary to convict the defendant of the crime laid, that is, of publiſhing a libel. Without the firſt and ſecond, the third cannot exiſt; but, it is poſſible that the two former may, without the third. This is evident from the notorious caſe of the ſeven biſhops.

Nevertheleſs there are to myſelf four things clearly deducible from this famous ſpeech; firſt, that the noble judge looks upon an explicit finding of the truth of the innuendoes to be ſo neceſſary, that the deciſion of the whole matter hinges there and depends upon it, "for a "doubt of it ſhould acquit the defendant, and a denial "thereof by the affidavits would produce a new trial;" ſecondly, that it is his own opinion that the jury are not to judge whether the paper be a libel or not, "they have "nothing to do with it;" thirdly, that the jury, if they find the defendant publiſhed at all, find him guilty of the libel, "becauſe they find the paper as charged in the in-"formation, which is their only enquiry," and fourthly and laſtly, that the court 'alone,' if the publication be proved, can and muſt acquit an innocent defendant, by arreſting judgment.

Before entering into a particular diſcuſſion of the conſiſtency and ſolidity of theſe poſitions, I will juſt throw out, that with reſpect to the preſent verdict, our ſole enquiry muſt be what in fact it was, and not what it ought to have been; that is, what the jury have done, and not what they ſhould have done. If their verdict be corrupt, they ought to be puniſhed, and the verdict ſet aſide of courſe; and, if it be unintelligible, it muſt be a nullity, for nothing can be made of it. And now to return to the ſpeech.

As my underſtanding is ſlow and naturally dull, I hope I may be admitted to declare without the ſuppoſition of affectation, that I can neither readily reconcile all the parts of it with each other, nor can I diſcern the concluſiveneſs of the reaſoning; and as I love to be open and ingenuous, altho' it be at the expence of my reputation for quickneſs

of apprehenſion, I will honeſtly ſay why. In the firſt place, " If the criminal conſtruction put upon the paper " in the information is denied (as from the affidavit ſtated " I find it was) I take it that it does appear the jury meant " to ſay that the paper was no libel," becauſe the whole and ſole criminal conſtruction put upon the paper by the information concludes to its being a libel; and the chief juſtice himſelf, as we have juſt now ſeen, grounds his arguments upon the ſilence of the affidavits with reſpect to the innuendoes, ſo that the phraſe 'criminal conſtruc-'tion' could not in his ſenſe refer to them, and then there is nothing that it could refer to, but to the paper itſelf being no libel. Nor can I reconcile therefore his ſtating at the outſet that 'by the affidavit, only the cri-'minal conſtruction is denied,' with collecting afterwards 'that it does not appear from the affidavit whether the 'jury meant to ſay that the paper is no libel.' In the next place, if the truth of the innuendoes be neceſſary to ſupport the criminal conſtruction (which I fancy Lord Mansfield will not deny) and that the criminal conſtruction was the 'giſt' or object of the information, the affidavit-makers might think that by denying ſuch criminal conſtruction, they had ſhewn, that they, as jurors, meant to ſay the paper was no libel, and having therefore deſtroyed the very foundation of the information, need not lengthen their affidavit with ſtating unneceſſary particulars. In a word, I conſider the affidavits as ſaying in a general way, what the makers of them might certainly have ſaid generally as jurors, that the defendant was not guilty. And if they are not now heard by the court, or liſtened to as jurors about their verdict, in what light do they gain ſo far the ear of the court, as to be indulged with 'ſtating' what they have to ſay? a general verdict could not have been refuſed, nor could the members of the jury have been forced to explain upon what grounds they went, the verdict being clear, uſual and legal. A jury indeed, according to Lord Vaughan, may like the ſeveral judges of a court form the ſame general concluſion from different motives: it is not requiſite that they ſhould concur in the ſame motives. They might or might not, for aught that appears, have believed the innuendoes to be rightly applied. They have not ſaid one ſyllable to lead to a belief, or conſtruction one way or the other. It is agreed that they are totally ſilent on the point. But, if the ſpeech of the noble judge who ſummed up to them, did not want its common ingredients and effect, they muſt have

have both underſtood and been perſuaded that the application of the words in the information to the blanks in the letter was their principal, if not only conſideration, and muſt therefore have drawn their concluſion from a diſbelief of the innuendoes. On the contrary how an inference, the reverſe of this, can not only be made from the ſame premiſes, but be relied on as infallible, ſo as to make ground for deciding the queſtion upon, is paſt my underſtanding. Indeed how the criminal conſtruction can be conſidered independently of the innuendoes which are neceſſary to form it, I cannot well conceive. And therefore, I am perfectly amazed how from the denial of ſuch criminal conſtruction and mere non-mention of the innuendoes any lawyer can with confidence infer the admiſſion of, or an incapacity of denying the latter. Is it uſual, or neceſſary 'in law,' for a layman ſwearing to his belief of a thing to ſtate all the grounds of ſuch belief? It certainly is not ſo among logicians or mathematicians. All writers whether profeſſional or unprofeſſional make uſe of many concluſions, inferences and deductions, without giving the ſeveral ſteps or preliminary propoſitions from whence ſuch deductions are made. I have heard too that wiſe judges 'never' enter on record the reaſons upon which they ground their decrees, becauſe many a judgment from the ſeſſions, plantations, and other judicatures have been ſet aſide on account of the bad grounds entered for them, which judgments were right in themſelves, and would have ſtood, but for the diſcloſure of the bad grounds, on which they were formed. The reaſoning from nothing being ſaid of a thing, either to its belief or diſbelief by the deponent, is very precarious and inconcluſive. It is, without a pun, reaſoning from nothing, and the common adage ſays, *ex nihilo nil fit*. It is, I believe, the firſt time that an argument from ſuch a ſource was ever taken for poſitive proof, and conſidered as a ground ſufficient of itſelf for a criminal judgment. Nothing can exceed the extravagance of ſuch proceeding. It is poſſible likewiſe, that theſe affidavit-jurors might regard the 'innuendoes,' the 'criminal conſtruction' and 'libel' as nearly ſynonimous terms in this caſe, and therefore ſpecified their diſbelief of no more than one of them, for the ſake of avoiding tautology and prolixity. In fine, it might be omitted for want of knowing that the court would expect a denial of the truth of the innuendoes; and they might well be excuſed for ſuch an ignorance, becauſe they muſt have heard that, if they would, they might have taken upon them to judge

of the intention of the defendant, and if they believed, as they now ſwear, that it was not criminal, they might have found him not guilty. I can aſſure them, had I been upon the jury, and really believed ſo, I ſhould have thought myſelf bound in conſcience to have brought in ſuch a verdict. But whether I am right or wrong in what I have advanced upon this head, it is I think not to be denied, that unleſs the court of King's Bench had ſignified previous to theſe affidavits being made, that they ſhould conſider none as material which did not deny the truth of the innuendoes, they can have no pretence to ground a judgment againſt the defendant, upon an omiſſion of that circumſtance. It will be catching the jurors in a very unuſual net; and what catching practice of any ſort ever redounded to the credit of any party, cauſe or judicature? Nay, I will go farther, and ſay it is impoſſible to ſupport any judgment given upon ſuch ground. In the third and laſt place, I am not ſatisfied with the reaſoning of the chief, in ſaying, "that to have denied the application of "the innuendoes would have been very material, becauſe "in that caſe there would be no proof of the paper as "charged in the information," and "that if the jury "find the defendant publiſhed at all, they find the paper "as charged in the information, for that is their only en-"quiry." For it ſeems to me, that the paper charged in the information is the paper actually printed, and as a proof that it is ſo, the printed paper is always produced, to prove that charged in the information, which it could not do were they different and not one and the ſame paper. But a demonſtration of this being ſo, is that any variance between the original, and the paper ſet forth, would be fatal, it muſt be the very tenor with the blanks, and not the purport thereof. And I ſuppoſe, if a regular ſpecial verdict were in any ſuch cauſe to be drawn up, for the ſake of determining by a ſolemn judgment in Weſtminſter-hall, whether the court of King's-bench, or juries, were according to the conſtitution of this kingdom, to be judges of the ſedition and malice alledged in libel, it would be neceſſary for ſuch verdict, to ſtate that "as to, "&c. the jurors upon their oath ſay or find, that the de-"fendant on ſuch a day publiſhed the paper in the infor-"mation mentioned, and of the tenor there ſet forth," and then to go on and ſay "and the jurors further upon their "oaths ſay, that they find the blanks in the paper contained "and ſet forth in the ſaid information, meant the perſons

"and

" and things applied to them by the innuendoes in the ſaid " information. But whether the defendant be culpable " thereby of publiſhing a ſeditious and malicious libel, " they refer to the court." Now, if this or any thing like it, would be the regular way of taking ſuch ſpecial verdict, it is another proof that the paper charged in the information, is the paper actually printed. Beſides, the intent of all judicatures is that a defendant ſhould ſuffer for what he really did, and not for arbitrary and groundleſs ſuggeſtions in a bill, declaration, information, or indictment. It is the buſineſs both of judge, and inqueſt, to ſee that this take place. A proſecutor therefore, takes care by his count, to charge an editor with the publication of a libel, of ſuch tenor, which he ſets forth literally; agreeably to the fact, and in the doing of this, where blanks, aſteriſks, or cant words, occur in the original, after giving them as printed, he declares they intend ſuch perſons and things, and his council, at the trial, always endeavour to convince the inqueſt, that the blanks of the real paper ſo ſet forth, are rightly interpreted by the court, and when he has done this, he expatiates upon the wickedneſs, and malice evident therefrom, and aggravates them as much as he can. The jury if they find him generally guilty, do and muſt at all events, find that the paper has been both truly recited, and explained. In ſhort the paper all along underſtood by the pleadings, the parties, judge and jury, is one and the ſame, the real and original paper, and can be no other. And it is the interpretation of the blanks, or the criminal conſtruction drawn from thence, which creates all the diſpute in the matter. The innuendoes make no part of the paper; they are placed in the information immediately after the reſpective words, to which they are applied, apart from them, and included within crotchets, on purpoſe to be diſtinguiſhed from the paper itſelf, which is ſet forth; becauſe, if it could be conceived that they made any part of the real paper, and were intended as ſuch by the countor, they would occaſion a fatal variance, and deſtroy the neceſſary tenor. This not only proves the paper publiſhed to be a diſtinct thing from the innuendoes, but to be ſo conſidered by the information itſelf: For which reaſon the inqueſt may moſt certainly find the defendant to have publiſhed a paper of the tenor ſet forth in the information, but deny that the explanations, or innuendoes, applied to the blanks therein ſet forth, are true. And conſequently the jury might in this cauſe, have denied the application of the

innuendoes,

innuendoes, although there had been proof to them of the publication of the very paper ſet forth in the information, and which was by that information, charged with thoſe innuendoes; and therefore the jury by finding that the defendant publiſhed the paper 'only' as ſet forth in the information, do not find the charges made thereon by the information. If this be ſo, as I proteſt it ſeems to me clearly to be, the argument on this head is grounded on a falſe and ſtrange conceit. But were it not ſo, if by finding the mere publication, the jury find the paper as charged, they muſt find it not only pregnant of the ſenſe of the innuendoes, but of the ſedition, and malice, ſet out in the information; for, it is 'equally' charged with both; and yet the judge aſſured the jury 'they had nothing to do with the latter,' for it belonged to another examen, and by their affidavits they have expreſly denied the criminal conſtruction. Neither can I reconcile his ſaying in one part of his ſpeech, "to have denied the application of the "innuendoes would have been very material. In that "caſe, there would be no proof to the jury of the paper "as charged in the information," with the ſaying afterwards "that if they were not ſatisfied of the fact of "publication, or had a doubt of the application of any "of the words in the information, to the blanks in the "letter, they muſt acquit the defendant;" becauſe the 'or' in the latter paſſage, ſeems to imply that the ſpeaker himſelf conſidered the fact of publication, and the application of the innuendoes as diſtinct things, and that one might be found, and the other not, by the jury. For "he ſummed up to them, that if they were not ſatisfied, or had a doubt about either, they muſt acquit "the defendant." Now, if this be true, the ſpeaker has anſwered himſelf, and admitted what I have been endeavouring to prove. Is it not at leaſt concluſive to himſelf, as *argumentum ad hominem?*

There is a report too, whether well or ill founded thoſe who attended the trial beſt know, that in your caſe, Mr. Almon, your counſel opened as your defence, that "you were in the country when the copies of the paper, "for the vending of which you were proſecuted, were "brought to your houſe, that they were ſold without "your knowledge, that your name had been put to the "title page, without your privity, and that ſo ſoon as you "returned to town, you ſent back what remained of the "copies, and complained of the liberty taken with your "name;"

'name;" that no witneſſes were however examined to give this teſtimony: but that the judge who tried the cauſe took notice of the defence opened, and ſaid, had it been proved, he ſhould have directed the jury to have acquitted you. If this be ſo, one would be inclined to think that this judge did not regard the jury, as having nothing to do with the criminal conſtruction, and with the conſideration of the intent with which any act of publication was attended, nor that this was ſolely the province of the court. But, in truth, whether any deed be intentionally done to injure another, is and muſt be before the jury, where a man is criminally charged with ſuch deed, and brought to anſwer for it before them. In a civil action the ſufferer may and ought to recover damages, from a perſon who has even involuntarily injured him; but it is contrary to all ideas of juſtice, that ſuch an unlucky or fooliſh treſpaſſer ſhould be criminally purſued as a bad man, and a delinquent to the ſtate for what he did without evil intent, and be on that account fined to the public; and if this be unjuſt, how can a jury find him guilty? there can be no guilt where there is no injury deſigned; and if a jury are induced to uſe the word guilty in their finding, and it be plain they only meant to find the ſimple fact, and to exclude all guilt, the verdict is incorrectly and improperly worded, but it is of clear import, and is in law a verdict of acquittal in criminal proceedings. There no reparation in damages is ſought by the party injured. The wickedneſs of the agent, and not the injury to the patient, is tried.

After having ſaid ſo much, it is matter of ſupererogation to take notice of what fell from a learned coadjutor to the grand juſticiary of England, but it can hardly be avoided, out of reſpect to his perſon, at this time. His words by the monthly publications are theſe, "the jury "are elected, tried and ſworn, to determine concerning "the matters contained in the information, therefore if "they find any fact of publication, they muſt find, not "the ſimple fact of publiſhing that Public Advertiſer, "ſold at the defendant's houſe, but the very libel charged "in the information." Many of the arguments before offered apply to this. The jury are certainly ſworn to try the truth of the matter or allegations in the information; and, by the way, the very calling them matters, in the plural number, ſhews that they are ſeveral. Let us therefore enumerate them. One is, that the defendant

publiſhed the ‘ Advertiſer’ ſold at his ſhop, and ſet forth in the information *in hæc verba*; another is, that the blanks therein meant ſo and ſo; and a third, that the publication of ſuch paper, with ſuch meaning, is a libel. How can it be ſaid then, if they find the fact of the defendant's having publiſhed that ‘ Public Advertiſer’ with the blanks therein, agreeable to its tenor in the information, that by finding this one fact, they ‘ muſt’ find not that ſingle fact, but the very libel charged in the information? ſurely, the proving of the paper with the blanks as ſet forth, is not proving *ipſo facto* the innuendoes with regard to thoſe blanks; nor is the proving the publication of the paper, and the truth of the innuendoes proof in itſelf of a libel. By a parity of reaſon, the jury may find he fact of publication, and not find the blanks to be properly filled up. The filling up is the informant's, and the publication with chaſms the defendant's act. The one writes (or publiſhes) and the other conſtrues. Now theſe two things being ſeparate in their nature, altho' the information ſhould unite them, and make them one conſideration (which, however, I do not admit) yet, it is poſſible the jury may have conſidered them diſtinctly, and it is plain that Lord Mansfield did ſo in his inſtructive ſumming up, when he talked of them as two facts for their conſideration, either of which not being proved, the defendant ought to be acquitted, (and, in that, I perfectly agree with his lordſhip). However the jury might be puzzled by the ſeveral diviſions run upon the ſubject, and hearing over and over again, that they muſt find the defendant guilty, unleſs they diſbelieved the fact of publication, by which ſummary way of ſpeaking, the judge (I ſuppoſe) might mean the paper, as innuendoed; the jury were led into this ſpecial finding, whereby they have found the publication, and excluded the innuendoes, altho' they ſhould, according to the directions accurately underſtood, have found the defendant not guilty. The conſequence of which is, that this verdict comes before the court for a conſtruction, and this can only be made agreeable to the intention of it. It is a queſtion of fact therefore, what did the jury mean, and what have they ſaid, and not what ſhould they have ſaid? nor what ſhould they have done? We all know, without doubt, that whether the filling up be right or wrong, depends upon the meaning of the author, and whether the publication be criminal or not in the publiſher, depends upon his knowledge

knowledge of the meaning; but finally, allowing the paper to be truly interpreted, and proved, whether it be a libel is ſtill a diſtinct conſideration. In a word, the finding of one thing, is not the finding of another, much leſs is it the finding two or three things. As to the laſt point, (the ſum of the whole) the libel itſelf being before the jury, I think we agree; for the learned judge, by ſaying that "the jury are ſworn to determine concerning the "matters contained in the information, and that they "muſt find not the ſimple fact of publiſhing that Public "Advertiſer ſold at the defendant's ſhop, but the very "libel charged in the information," muſt mean, that the jury are not merely to try the ſingle fact of publication, but all the matters contained in the information, that is, every thing charged and loaded upon the paper. For which reaſon the jury muſt determine, according to this authority, whether, in their apprehenſion the ſame be a libel or not, for that is a matter very ſtrongly charged on the paper, by the information, and the ſum of the whole. But this ſubject, ſome how or other, like ſchool divinity, is not only a quickſand for common, but for excellent ſenſe, and involves the arguer even in ſelf-contradictory terms.

In the Star-chamber, as has been obſerved, where no jury was admitted, all ſtate-libels were formerly tried, and of courſe the judges of the court wholly determined what was, or was not a libel. The reverend bench has therefore ever ſince claimed the excluſive right of deciding this point, without conſidering that by the principles of the juridical part of this conſtitution, where a jury is ſummoned, the judgment of all facts muſt be left to them, and that this holds throughout the region of crimes. The intention of a ſuppoſed libeller is as much within their cognizance, as the intention of any other ſuppoſed criminal; and what judge pretends to queſtion their competency in this reſpect, as to every offence beſides? *boni eſt judicis ampliare juriſdictionem*, is a maxim more remarkable for its oddity than its propriety.

Suppoſing now the printed relations true, would not any one ſay, that in the great man's own opinion, the verdict had not found the innuendoes, nay, that he himſelf was even apprehenſive it had excluded them? and, that there could be no other way of accounting for his liſtening to affidavits from jurors diſimpanneled, or his ſaying, that had they denied the truth of the innuendoes, there ſhould be a new trial?

By the bye, how could any bench or judge admit jurors to be judges whether blanks were truly filled up, unleſs they allow jurors to be judges of the meaning of the blanks? this is, ſurely, an inference made by the mind, as much as whether the paper was printed factiouſly and maliciouſly. The defendant's intention by the printing of blanks, is very diſtinct from the mere inanimate mechanical effect of his preſs upon the letters, ink and paper. It is not a viſible external act, but internal, and a mere operation of mind. In reality, it is abſolutely impoſſible from this and various other conſiderations, to contend that the deſign of the writer, printer and publiſher, in matter of libel is not always to be ſubmitted to the jury, for their opinion.

But, for a moment admitting the contrary doctrine, what muſt be the effect of it? it muſt be that the jurors, having nothing to do with the intention of the writer, could not find what he intended by the blanks, and could only find the fact, of his having printed and publiſhed a paper with ſuch blanks. And then there is an end to their pretence, that the jury having by their preſent verdict actually found, that the defendant by ſuch blanks, intended what was innuendoed thereof in the information.

Well then, to avoid this preſſing ultimate difficulty, we muſt, after all, reſort to the ſole true doctrine, namely, that the jury are judges of the intention of the writer, and conſequently competent to the whole of the charge in the information.

This being at length conceded, let us aſk whether they have not in fact exerciſed this right in the full extent, by the late verdict, whereby they find the defendant, who was charged with printing and publiſhing a paper of ſuch tenor, and with meaning ſuch perſons by the blanks therein, and with putting forth the ſame maliciouſly, to be guilty of 'printing and publiſhing it only,' or (in other words) of the bare impreſſion? does not the word 'only ſignify 'ſingly, ſimply, and merely?' if ſo, does it not acquit the defendant of the innuendoes, and of the whole criminal conſtruction put upon the paper? by finding him guilty of the publiſhing the paper as printed with blanks only, of this *one* thing, it is evidently and certainly implied, that he was charged with other things, and that they could not find him guilty of any of thoſe other things. The word *only* can have no other meaning than to confine and limit the verdict to the ſimple publication, to that preciſe individual thing, and conſequently to exclude all the other matters.

I ſhall

I ſhall therefore conclude with ſaying, the ſole ſenſible conſtruction of the verdict, in my poor opinion is, that the jury have found the defendant guilty of nothing that is a crime, and have therefore virtually, tho' not in expreſs words acquitted him. The uſe of the word 'guilty' in the verdict, will not make guilt contrary to its clear meaning by a context. Such a conſtruction is a force upon the words, and makes nonſenſe. Now, it is impoſſible to ſuppoſe, ſo eminent a judge could receive a nonſenſical verdict. Beſides, the law prefers and adopts any conſtruction, that ſupports to one that deſtroys a deed.

One is, I allow, apt to be too cunning in the kind of animadverſions, which I am making, even without having any the leaſt perſonal ill will, and I certainly have none, and without there being any perſonal intereſt in the matter of either ſide. But, unleſs I am much miſtaken, there is ſomething remarkable in the whole of our grand juſticiary's conduct in this buſineſs, ſomething ſtrikingly characteriſtic—His anxiouſneſs to know what the jurymen had ſworn by their affidavits, inſomuch as to direct the purport of them to be ſtated, although they could not be read; his refraining till this was done, to ſay what was the ſenſe of the verdict; his then taking notice that the jurors had not denied the truth of the innuendoes, which was the only thing that could poſſibly be material, and which had they done, there ſhould have been a new trial; his ſtating that he had particularly put them in mind of the innuendoes in ſumming up, when he told them they were the principal, the only object of their enquiry, and, if they even doubted of the truth of their application, they ought to acquit the defendant; his aſſerting that the information had ſo joined theſe innuendoes, with the publication, that if they found the defendant publiſhed at all, they muſt find the paper, as charged in the information: And yet, what?—doing nothing in conſequence of this clear reſult, neither making the rule then abſolute for entering up a legal verdict, nor ſaying that muſt be done, nor appointing any certain day for reconſideration of the matter, but generally adjourning the whole till next winter. Is it not rather obſervable alſo, that no notice was taken, by this circumſpect, and ſatisfactory law-dictator, of the word 'only,' the moſt ſingular expreſſion in the verdict, the main theme of the arguments of counſel, and of the attention of the bar? and, that throughout this well adviſed, pregnant, and pithy ſpeech, this ſupreme crown magiſtrate never once declared, what he himſelf

really believed in his conſcience was the intention of the jurors, by this their peculiar verdict, nor ventured to aſſert that they actually had found the truth of the innuendoes? Is not all this conviction where the ſhoe really pinches?

His candor is ſuch that he would have been explicit, I dare engage, upon theſe points, eſpecially as being the judge who received ſo unuſual a verdict, had he been aware that the audience went away perſuaded from his ſilence, upon ſo obvious an article, that he himſelf could not but believe the jury meant to find no more than the publication of that 'Public Advertiſer,' wherein were the blanks, and to declare they found nothing elſe. I wiſh therefore, he would, on the next hearing, (ſhould the matter not be put to ſleep like Bingley's attachment) vouchſafe to notice the word 'only,' and likewiſe to favor the people with an expreſs declaration of what he really does, and not an argumentative one of what he muſt believe the jury intended by their verdict. For this after all is the ſole thing requiſite, could it be come at, for deciding the untoward difficulty of the caſe. We ſhould all then be of one mind. It is therefore a thouſand pities that this little word 'only' eſcaped his Lordſhip's attention, and that he did not think of candidly acquainting the public with his own private belief of the jury's intention by their verdict, more eſpecially as the taking of it was his proper act in his own houſe.

At preſent my neighbours are always aſking, "why "would the affidavits have been ſo material, had they "denied the truth of the innuendoes? The court muſt "doubt whether the truth of them be not denied by the "verdict, or at leaſt cannot be poſitive that the truth of "them is found by the verdict; for, ſurely, if the jury "have found expreſsly either for or againſt the innuendoes, nothing could be ſo improper as to permit that "finding, to be controverted by affidavits; no court "would endure this, nor open ſuch a door for perjury, "and the overturning of verdicts in general; the true "reaſon then, is, the verdicts being defective, or indeciſive in this capital point, in the opinion of the court; "and if this be ſo, is a new verdict now to be made for "the purpoſe; and that not by poſitive affidavit to the "point, but by inference from nothing being ſaid about "it? This is a way of coining verdicts, and minting juſtice?" I tell them the magazine writer has certainly belled the court. It cannot be true. Indeed I ſuſpected

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ſo much from that ſtrange circumſtance of judges reading affidavits a little, 'in a court of juſtice,' and not as evidence, and yet afterwards arguing from this little reading, as if they were evidence, not merely to collateral matters, but to the very *jugulum cauſæ*. However, in my firſt agitation, before I diſcerned the falſity of this relation, I really aſked myſelf; is this or is it not an uſing of affidavits in adminiſtring juſtice? if it be, is it or is it not making them exidence? In God's name, is there to be no certainty from henceforward in the law, nor any rule to go by? Courts of Juſtice, when I was formerly of Gray's Inn, talked always of a plain line to walk by; obvious to common underſtandings, or that they themſelves could at leaſt always aſcertain, and which was equally open to the whole world, to the countryman as well as to the courtier. I wiſh there was a little more certainty, and a little leſs ingenuity; nor quite ſo much floating diſcretionary equity, but ſome fixed unequivocal, ſubſtantial law. Hold,—theſe magazine fellows miſrepreſent every thing, and there is nothing but fallacy and wayward political conduct in all parts of life. I don't credit a ſyllable of what I read, whether publiſhed by you Mr. Almon, or by adminiſtration.—Beſides, as to ſome matters, the leſs is ſaid of them the better.

With reſpect to verdicts, it is commonly ſaid that "a "verdict which finds part of the iſſue, and finds nothing "for the reſidue, is inſufficient for the whole, becauſe "the jury have not tried the whole iſſue, wherein they "were charged. If a thing is left out and cannot be in-"tended, the verdict is not good. But if the verdict "may any ways be conſtrued, a conſtruction to deſtroy "it ought not to be made. The court will reject ſur-"pluſage." And my Lord *Coke* ſays "the matter and "ſubſtance of the iſſue muſt be found."

According to the foregoing rules, there can I think be no doubt but that the verdict in agitation is good. It may, and therefore ought to be conſtrued to have found the bare fact of publication, and, by finding that 'only,' to have excluded the interpretation of the blanks, and the criminal conſtruction laid in the information. But it is impoſſible by any conſtruction to make out that it has found the application of the innuendoes to be juſt. The rejection of the word 'only' as ſurpluſage, will not ſerve the turn. My Lord Mansfield ſays, the jury are the ſole judges, whether the blanks are truly ſupplied, and that this is the material part of the iſſue, and it is therefore requiſite that

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the court which is to give judgment, ſhould be ſatisfied that the jury have found it. In his ſumming up, he inſtructed them, that if they did not believe the fact of publication, or had a doubt whether the blanks were truly ſupplied, they ſhould acquit the defendant. They have by a ſpecial finding, found the fact of publication 'only.' Is not this expreſsly finding one of the two matters, which he laid before them, and rejecting the other? Apply their verdict to his Lordſhip's directory ſumming up, and there cannot remain the ſhadow of a doubt in any man's mind. But even by a hardy rejection of the operative word 'only,' which the jury evidently inſerted by deſign, it is impoſſible to make out that they have poſitively and unqueſtionably found the innuendoes by finding the publication; and the ſuperinduction of the ſilence about them in the affidavits, as an admiſſion of them, and a confirmation of ſuch conſtruction, is plainly ridiculous.

In ſhort, the finding muſt be either a verdict or a nullity, but the latter cannot be ſuppoſed, as ſo able a man took it for a verdict. If it be one then, it muſt be either a ſpecial or a general verdict. If it be the former, the words moſt clearly cannot be varied. But it ſeems, on all ſides, to be agreed, that it is not what is denominated in law, a ſpecial verdict; it muſt then and can only be a general verdict ſomewhat peculiarly worded, or (excuſe the ſeeming contradictorineſs of terms) a ſpecial finding of a general verdict. This being the caſe, nothing is left to inference or intendment (as has been proved before) and the defendant muſt be either found guilty or acquitted. If he be found guilty, why is not the verdict entered as taken by the Chief Juſtice, agreeable to the finding, and ſentence paſſed upon the defendant? On the contrary, if it be admitted, as it is by the motion made, and the rule to ſhew cauſe granted, that no ſentence or judgment can be paſſed upon the verdict, as it now ſtands; it muſt be a verdict of acquittal; there is no medium. Let me add too, that every man remains in the eye of the law innocent of any crime until expreſsly found guilty of one; and if the verdict as it ſtands has not poſitively found the defendant guilty of any crime, he certainly remains innocent, and muſt be diſcharged as ſuch.

Great geniuſes are very apt, for the ſake of avoiding trouble, and from ſuperficial haſty conſiderations, to caſt aſide old formalities, by which they frequently do much injury to the public, and not uncommonly draw themſelves

ſelves into ſcrapes, which, had ancient rites been adhered to, could not have taken place. This brings to my mind the old practice touching "privy verdicts, which "are ſo called, becauſe they ought to be kept ſecret and "privy from each of the parties, before they are affirmed "in court. Indeed, in ſtrictneſs it is no verdict, until "affirmed in court; for, the jury upon coming into open "court, may alter their privy verdict, and, if they do, "the latter ſhall ſtand." Such is the law. But many reaſons may be offered in juſtification of the utility of it. If every verdict privately delivered is afterwards to be publicly confirmed by the jury in open court, in the preſence of counſel of both ſides, if becomes the buſineſs both of bench and bar to ſee that the true and proper verdict be received. There is beſides ſomething in the air of a court of juſtice, and a public audience to rouze the thoughtleſs, and to alarm the corrupt judge. The aukward dilemma in which we now find ourſelves, without being able to advance, retreat, or ſtand ſtill with credit, and the ſuſpenſe of judgment for four months, would never have diſgraced the 'K. and Woodfall,' had this ſmall old ceremonial been complied with. The crown-lawyers would have had no occaſion for making a motion, which ſavors of indecency towards the judge who tried the cauſe, inſomuch as it proceeds upon a ſuppoſition, that the verdict is inſufficient, and ſhould not therefore have been received; nor would the court of K. B. have been obliged ſo far to countenance the propriety of the motion, as to grant a rule to ſhew cauſe thereon. What can a bye-ſtander ſay of ſuch a buſineſs, but that it hobbles at beſt?

Things are come to ſo ſtrange a paſs, that I think, the only conſideration at preſent is, how to get off in the beſt manner; and as purity of conduct is of greater account in theſe matters, than ingenuity of device, that, and not this, muſt be chiefly conſulted. I lament from my ſincere regard for courts of juſtice, and the reverence I bear to them, that the heart and the head ſhould ever be ſuppoſed to draw different ways, or that the ſurmiſe of indirect dealing ſhould in the leaſt obtain; but malevolence and obloquy are the fruit of the ſeaſon. Let us then drop that ſuſpicious Janus-faced expedient of ſearching after the 'legal import' of the words, determine that the vulgar, common, natural, and real meaning is to be taken, and, if it be capable of more interpretations than one,

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that the moſt favourable muſt be adopted; or, finally, if no meaning at all can be made out, that the verdict is a nullity, let who will have received it. Altho', it ſeems to me, as Serjeant Glynn has argued, that as "juries "are ſaid to negative in queſtions of civil property every "thing which they do not find; much more muſt they "be ſaid to do ſo in criminal proceedings." It is not only law, but the ſaying in other words what has been before advanced, namely, that a criminal intention muſt be found expreſly, before guilt can take place at all, and it muſt be found expreſly, and not preſumed againſt any defendant.

Where the paper is not, like a law-inſtrument, drawn in technical, legal expreſſions, nor the deviſe of property (the creature of law), it wants no comment of lawyers, and it is the proper province of laymen to put a conſtruction thereon, and to find the intention, that is, whether the queſtionable expreſſions are uſed with a criminal view or not. The determination in the caſe of Beare is indefenſible; it is not indeed, groſs, palpable Iriſh nonſenſe, obvious to the pooreſt underſtanding, but it is, what is as bad, metaphyſical, ſcholaſtic, ſophiſticated nonſenſe. The attempt to enter up a verdict different from what was really given is ſtill worſe, and would alarm the public forty times as much. It would be underſtood as an experiment, made for the purpoſe of enabling judges in crown proſecutions to make a verdict for juries, by recommending it to them at the trial, to find the ſimple fact as it ſhould appear to them, becauſe the court would take care of the reſt; and then for the court, before giving judgment, to direct the verdict to be entered up according to the legal import of the words, that is a general verdict of guilty to the whole charge. For, if this may be done in the caſe of Woodfall, where the jury have ſcrupulouſly added the word 'only,' it may moſt certainly be done in any caſe whatever, as a ſtronger cannot be ſuggeſted. The people would really then think, that there was an end of the trial by juries in crown cauſes, and that though one was oſtenſibly ſummoned, it would no more anſwer the true conſtitutional purpoſe, than the inſignificant parliament of France anſwers to the effective parliament of Great Britain.

There is after all, in my own opinion, nothing like travelling the old beaten road of the conſtitution, without ſtarting new ſchemes from a deſire of ſhewing ſuperior

rior parts, or for the ſake of introducing what one thinks would be an improvement in the law. A man may happen to diſlike the trial by jury, and an unlicenſed preſs, and would really, had he the modelling of a government, under which himſelf was to live, have neither; but if the courſe of his profeſſion and extraordinary talents were to bring ſuch a man to be Chief Juſtice of England, (by far the moſt important poſt in the kingdom, becauſe all diſputes between the king and the ſubject muſt there be tried,) he muſt be content to take the law of England as he finds it, and to adminiſter it in the uſual way. Every open attempt to change it (however ſincerely he might mean an improvement) would tend to his own diſcomfort and diſappointment, and every ſubtle and indirect ſtep for the purpoſe would ſubject him to contumely and to the worſt and moſt injurious of imputations. If a law is to be ſtrained, or a verdict either to be compaſſed or conſtrued artificially, for the ſake even of a good end, for the puniſhment of a popular raſcal, it is a groſs injury to the conſtitution, and will lead the way to a thouſand perverſions of the law for the ſake of very bad ends. Twenty abſurd or unjuſt verdicts in factious times, againſt libellers in particular, will not weigh as a ſtraw againſt the noble ſervice that juries have done in arbitrary reigns, in the caſe of the ſeven biſhops, and in many other inſtances, by which in a great meaſure, the liberties of this country have been preſerved. The ſame may be ſaid of heretical or deiſtical writings; in ſhort of a free preſs generally. Beſides, I am one of thoſe who doubt whether the great men who have preſided in our courts of law formerly had not as much acute underſtanding and ſound judgment as any of the able men now living. As in hearing counſel it will generally happen, that the firſt ſays every thing, yet it will ſometimes fall out that even the third (though a plain man) ſhall hit upon ſomething ſo material as to weigh in the deciſion of the cauſe, and therefore they ſhould all be heard: So with reſpect to old forms, they ſeem for the moſt part tedious and uſeleſs, yet the omiſſion of them ſhall in ſome particular caſe occaſion a difficulty which could never otherwiſe have happened. It is therefore a right rule *ſtare ſuper vias antiquas*, to expound and to execute the law in the way that our forefathers did. A judge that is for ſtriking out new paths in the law which has ſtood the teſt of ages, and either imagines that he himſelf is right, or that the world will think him ſo, counts without his hoſt.

If old forms were to be rigidly purſued, there would be no room for much diſplay of parts, and the proving of any thing, by any thing, which one now and then hears of. The deſire of improving the law and conſtitution, is dangerous vanity at the beſt. And were there at any time to ariſe ſome one particular judge who ſhould think much change neceſſary, and at the ſame time ſuch judge ſhould never try a popular cauſe; or decide any point between the crown and the ſubject without affording juſt matter for animadverſion and ſurpriſe; or, in vulgar terms, without making himſelf the ſubject of every body's comment, I ſhould doubt his having greater diſcernment or more infallible judgment than thoſe who went before him. It would rather introduce ſome ſuſpicion of the hollowneſs of his head or his heart. If the former were the caſe, the apparent ſuperiority of his talents muſt lie rather in ſophiſtry than in ſolidity of judgment, and be better calculated for immediate victory and triumph, than for giving final and laſting ſatisfaction. Temporary ſpeciouſneſs is but a miſchievous, treacherous quality in a judge, although it be every thing in an advocate. I remember many years ago, a ſupreme law-magiſtrate, who, both in the King's-bench and the Chancery, manifeſted the utmoſt deference to former determinations, a ſolicitude to find out the true grounds and principles on which they proceeded, and a deſire of hearing all that could be ſaid by the counſel of either ſide. He would then deliver ſo legal, ſo ſound, ſo comprehenſive, ſo juſtly principled a judgment on the points before him, as ſatisfied all mankind of the impartiality, of the truth, of the circumſpectneſs, and of the profeſſional and juridicial correctneſs of his decrees. In ſhort, he heard fully, and determined completely. He was neither at conſtant war with juries, nor with the law and forms of our forefathers. He performed his part without oſtentatious ſmartneſs, ſupercilioufneſs, the artifice of logicial ratiocination, or the parade of civil law learning, and the authority of imperial codes. His conduct on the bench won the reſpect of every body; parties, counſel and bar: for twenty-three or four years ſucceſſively. And time itſelf and future diſcuſſion, have not impaired or ſhaken his ſentences. Nevertheleſs he is not ſuppoſed to have been freer from ſelfiſh and political views than other lawyers, that is to ſay, other men. But he had too much cool ſound ſenſe, with the magiſterial gown upon his back, in

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deliberating upon legal matter, to look at aught but the precedents of former times, the arguments in the cauſe, and the genuine principles of law. He knew that neither the weight of his office, nor any preſent artificial refinement, could preſerve his opinions and demeanor from being ſcrutinized by a diſcerning bar, and (ſhould they detect any fallacy and obliquity, as were there any they certainly would) from being abuſed by the public. Such a ſilent ſagacious auditory will ſee through the greateſt ſophiſt that ever ſpoke; and, after ſcanning his ſophiſms among themſelves, by degrees drop their ſhrewd redargutions among the world. With acute practiſers every ſtudied preface of impartiality, of prodigious firmneſs, of a diſregard of danger even to the loſs of life, and of an extreme anxiouſneſs in any crown proſecution to find out the ſmalleſt *iota* of juſtification for the defendant, will only raiſe an extraordinary attention to every colour of good or evil, to every ſhade or light, made uſe of by ſuch judge, and to the whole of his geſture; for their jealouſy will be ſet on the watch by the unduneſs and unuſualneſs of an elaborate exordium from the chaſte bench of ſober judicature. What ſhould make ſo artificial a beginning neceſſary? Judges who mean nothing unfair need never recur to theſe meretricious arts. Why then ſhould you uſe them? Do you imagine the world ſuſpects you of ſome deſign of not doing your duty? If not, it muſt be your conſciouſneſs of intending ſome duplicity that makes you thus call in beforehand ſuch guards to your reputation. Genuine ſimplicity and pure virtue are ever devoid of ficticious ornaments. Every extraordinary declaration, ſide ſpeech, hint, tone of voice, look or geſticulation will furniſh matter of animadverſion, and the uſer finally dupes himſelf and becomes the ſacrifice of his own artifice; whatever ſeeming conviction and rhetorical applauſe his argument or oration may carry with them at the time. Truth ſtands the edge of profeſſional and popular diſcuſſion, but ſophiſtry of neither; for it cannot alter the nature of things, although it will diſguiſe their appearance for a while. Time will always ſooner or later detect the adultery. *Opinionum commenta delet dies, naturæ judicia confirmat.*

So cenſorious are the times become, that mankind frequently places to the ſcore of court-influence, or court-views, what really and truly has no other foundation than enormous, over-weening vanity. At other times it miſ-

takes for deliberate miſchief, a deviation really made for the ſake of attaining particular juſtice. And yet there is no harm done by ſuch cenſure, for a departure from eſtabliſhed rules is generally miſchievous, as no foreſight can reach all the poſſible conſequences of it; and it certainly tends to the exerciſe of a diſcretionary judgment, the moſt pernicious of all principles for human courts of juſtice. The pretence of adapting the judgment to the peculiar circumſtances of each individual caſe is ſpecious, but it cannot be done without the deſtruction of all certainty and poſitive law. It is opening a way for arbitrary deciſion and judicial tyranny.

Let us recollect what a noiſe the alteration of a record, after iſſue joined, produced; it being unuſual. After diſcuſſion and ſearch of precedents, it was found to be ſufficiently warranted both by law and practice. It may be done by any judge at his houſe, the very minute before trial without the defendant's conſent. However, nothing but a ſolemn deciſion on the point would have appeaſed all diſcontent about it. The notion, that a defendant might have ſo far truſted to ſome flaw in the pleadings, which he was well adviſed would be fatal, as to forego the bringing of teſtimony in his behalf, notwithſtanding he really could have done ſo, was the ground of people's alarm. The making of a defence on the merits neceſſary juſt as the cauſe is called on, which was unneceſſary before, made the world conceive an honeſt defendant might be convicted ſometimes by ſurprize, and that ſuch an alteration of the record could not therefore be juſt, and conſequently not legal. They had heard that it had grounded a complaint to parliament in K. William's time, againſt a judge (one Halloway, I think). But it is now ſettled, and therefore notorious, and nobody in particular can be injured by ſuch practice hereafter; Mr. Wilkes no more than Dr. Shebbeare. The occaſion too frequently adds to the ſuſpicion, and none is ſo likely to miniſter ground of offence, as the caſe of a writer againſt adminiſtration.

Were I now to make a gueſs, 'the K. againſt Wood-'fall' will make a great noiſe, and the people will ſuſpect much more deceit and circumvention, than if it were North againſt Sandwich, Barrington againſt Hillſborough, Jenkinſon againſt Dyſon, Grenville againſt Chatham, or the caſe of any other more private combatants whom you may name. A judge has an unpleaſant taſk, in theſe curſed

curſed crown cauſes, eſpecially if he is obliged to alter the words of a verdict, after the jury giving it are diſcharged. It is worſe than the alteration of a record immediately before trial. The ignorant populace will ſay that no defendant is ſafe, either before or after trial, neither with or without a jury, from the correction of ſuch dextrous lords of police. Should a general verdict of guilty be extracted from the late particular finding of the jury, whether by the analytical or the ſynthetical mode of argumentation, no lenity in the fine and puniſhment will make a plain Engliſh juror reliſh the adjudication. It will be ſaid by the invidious oppoſition, and credited by the vulgar, that ſo ſlight a penalty was inflicted for the ſake of eſtabliſhing the precedent, and they will reſiſt it, as Hampden did the pittance of ſhipmoney demanded from him, or as the Americans do the payment of the paltry tea duty (not that I mean to inſinuate the leaſt real ſimilitude between the legal merits of the two laſt mentioned conſiderations). I know that nothing but the pureſt regard to the letter of law, and to the true conſtitutional interpretation of it, will have any influence on our reverend bench of criminal juriſdiction, unſwayed as they are by perſonal love of authority, or private intereſt, by fear or affection, by court or people: but, it is an unpleaſing ſituation, that the reception of this ſingular verdict has brought them into. For my own part, I have taken occaſion from the prints of the ſeaſon, and the ſuſpenſe of judicial proceedings during the vacation, to fling out my diſintereſted reflections upon the ſubject, and in ſo doing have grounded myſelf as to names and doctrines upon the magazines and regiſters, without being at all ſure that they are genuine or juſt; but an old and a feeble man, no barriſter, tho' formerly bred for one of the inns of court, and ſtill intimate with lawyers, may perhaps here and there ſuggeſt what is more worthy of obſervation than the rabble of Gazetteers or the liſted writers of a party. I do not pretend to be free from prejudice, altho' I wiſh to be ſo, but every man is inſenſibly warped by the company he keeps. An occaſional reſidence in town, and dinner parties at law-taverns and meetings at law coffee-houſes, furniſh me with moſt of my information, for I have not (thank God) ſeen the inſide of a law court for many a year, and being above want, and paſt ambition, I care not three ſtraws who is miniſter. To ſay the truth, nothing warms me in political matters beſides America,

which I preſume is intended to become the King's ſeparate dominion, independent of the controul of parliament, as Scotland was before the union. We are here taught that the Engliſh ſovereignty reſides in the king, lords, and commons, and that the king can do nothing with any part of the Britiſh dominions, without the conſent of his parliament; but, if I now underſtand the faſhionable, popular, doctrine, it is that the king with the provincial aſſemblies may govern as he thinks fit in America, altho' its inhabitants went from hence as ſubjects of the Britiſh ſtate, and when they come hither claim all the privileges of ſuch. In ſhort, they have every advantage of the parliamentary conſtitution, and are no aliens, in Great Britain; but, if they return to America, they owe no obedience to it, and are as totally exempt from its ſuperintendence as the Hanoverians or Lunenburgher's. Your laws are of no avail, but as adopted there; they may receive or reject them, as we do the civil law. Their acts of aſſembly need no ratification in parliament; the king's aſſent or his governor's is ſolely neceſſary: their appeals are not like the Iriſh to the Britiſh houſe of lords, but to the king and counſel. The king with their aſſemblies may raiſe what money, levy what forces, and uſe both for what purpoſes ſhall be agreed on, without the controul of parliament. They are called colonies, and as ſuch may be ſupplied by grants of parliament, and defended by Britiſh armaments maintained by parliament, but, they are, nevertheleſs, ſubject to no more controul from parliament than Portugal or Pruſſia. It ſeems, neither they nor we are repreſented, all government is at an end, and their rights (in the language of a rebellious letter, honoured with the name of a learned ſerjeant) are invaded, becauſe the Britiſh ſtate has claimed to govern them by its parliamentary ſtatutes. They are ſubjects to the king, but owe no ſubjection to the Britiſh government, unleſs it be underſtood that the parliament which made the king formerly, now makes no part of that government, and that the whole reſides in the king alone; and yet it may not be eaſy perhaps to give a good reaſon how this ſhould come about, and that they ſhould be able to ſhake off the parliament, without ſhaking off its creature. However, as the affair of America is of no moment with any ſet of men; I ſhall drop it as an inſignificant ſubject, in compariſon of Mr. Wilkes, and reſume the noble topics that we buſy ourſelves about, in the warmeſt and moſt violent manner.

Having,

Having, really and truly, no connection with great, political men, I am very little concerned about their ſentiments with reſpect to myſelf. The only matter that creates any uneaſineſs, in my deſultory way of writing, is, leſt I ſhould draw a ſuſpicion upon any other perſon of being the author, which I ſhould be heartily ſorry for. It might injure ſuch man with his friends. And yet, where a ſtory is told one, or a ſentiment thrown out, or particular ways of reaſoning, or modes of expreſſion uſed, which happen to ſtrike, it is difficult to avoid the repetition of them with one's pen, in ſuch a manner as to create with others, a ſurmiſe, that they, the original ventors of them, are the printing author, or to induce a belief in themſelves, that ſome companion may have made an unfair uſe of what hath been dropped by them in private converſation, and from thence to be uneaſy and to ſuſpect perhaps, ſeveral of their occaſional intimates. Let me, therefore, proteſt that I wiſh to be guilty neither of betraying what has fallen under the general ſanction of free gentlemanly diſcourſe, nor to hurt any particular man; but to plead for myſelf, that a thorough ſcrupulous attention to ſuch delicacies would prevent my writing at all, and that I truſt is more than any individual has a right, upon ſuch ground to exact from me.——Indeed, the more I reliſh a man's diſcourſe, the worſe I ſhall uſe him at this rate. Now, I am not given to talk much, but I ſit a great many hours in coffee houſes, where I cannot help liſtening to the diſcourſe of young diſputatious barriſters, who are inclined to ſhew their talents in argument, and their ingenuity in obſervations on what has paſſed, to whet their tongues for the bar by diſcuſſing points, and to acquire a little modeſt aſſurance in ſpeaking before company. Theſe ſtaid counſellors of no buſineſs, retainers to great men, idle members of parliament, old benchers, and other loquacious, legal, political gentry, that news-papers, and nothing to do, bring in my way, are, I confeſs, my beſt ſources of intelligence, and the oracles I conſult for the better underſtanding of what I read in political pamphlets. Being unaccuſtomed to gain my ſubſiſtence by my pen, and not having acquired the knack of writing, I am fain, very often, to uſe the words of the perſons, from whom I derive my knowledge, from a poverty of expreſſion that I labour under, and an unreadineſs in law-language, a propriety in which nothing but practice at the bar will give. My fearfulneſs therefore, in miſreporting what I have

have heard, muſt in ſome meaſure, apologize for my not having varied ſo much as I could wiſh, the habit, dreſs, and peculiarity of the relations which I retail. For I ſolemnly declare, I ſhould be aſhamed, wantonly, to make any illiberal uſe of what men of honour have very unadviſedly uttered in my preſence. But, what is ſaid in a coffee-houſe, a publick walk, or at a mixed dinner, cannot be deemed a perfect ſecret, and I have forborn alluding in the leaſt to any of them, and have delivered every thing in my own anonymous perſon. What I here ſay, I apply to the middling gentleman, who, perhaps, is of a particular party, and tho' a retainer to it, a man of worth; for, as to the leading men of all parties, I have long ceaſed to think they mean any thing but power, places, wealth and titles, without caring at all for the public, and if they do the ſtate any good, it is by accident, or becauſe it ſuits ſome preſent purpoſe of their own, and not for the ſake of the community, or of pure patriotiſm itſelf. Nor can I join the mobility, and dance round their hobby-horſe Jack of Ayleſbury, as the whores in the Beggars Opera do round Captain Macheath. But I ſpeculate and think for myſelf.

I wiſh to have government reſpectable, and my principal objection to the ſmall ware of miniſtry of the day, is that they have no heads at all. The government and the laws I ſhall be againſt changing, being no friend to innovations, but a ſincere one to liberty. There can be no harm in attacking miniſters; but let the Houſe of Commons, the bulwark of the democratic part of the ſtate retain its dignity, prerogatives, and independency, and let the laws be faithfully and boldly adminiſtered without refinements or ſophiſtications. One of the errors of the times has been the efforts to diminiſh the reverence for parliament, and for the courts of law, which can tend to nothing but to arbitrary power, and the governing without either, or to a general diſſolution of the ſtate, to anarchy and mob. The remarks which I have freely made on the K. againſt Bear, and the K. againſt Woodfall, are intended to check that ſtrain of legal interpretation which revolts the public and leads to a diſtruſt of the uprightneſs of judicature, by introducing jeſuitical caſuiſtry, in lieu of plain, obvious, common ſenſe. It will never do, if exerciſed by angels. Diſtruſt will beget diſlike, contempt, odium. Nothing can ſupport penal judgments, where the freedom of the preſs is concerned, and

liberty

liberty or ſuppoſed liberty at ſtake, but their being grounded on an expreſs conviction (of the very crime charged) by the clear verdict of a jury. Conſtructive guilt, the creature of the bench, will not be endured. It will make the ſeat of juſtice ſhake under the judge who pronounces it, I venture to foretell.

Nothing will be deemed a crime that is not found to be 'wilful and malicious.' My Lord Hale ſays, that "if "A. ſhoot 'unlawfully' in a hand-gun at the cattle or poul-"try of B, and the fire thereof ſets another's houſe on "fire, this is not felony, for though the act he was "doing were unlawful, yet he had no intention to burn "the houſe thereby." And this intention the jury muſt judge of. So "in treſpaſs for breaking a park-wall, "with an intent to kill deer, the jury may find the de-"fendant guilty of breaking the wall 'only,' and this is a "good verdict." And whether there was in the act the wicked intention laid, the jury will for ever judge. The authorities of Lord Coke, Lord Hale, Lord Vaughan, and Lord Raymond, will juſtify them in what they do, and ſo will the very doctrine advanced by my Lord Holt, in the K. againſt Bear, notwithſtanding a modern compiler of crown-law, the brieſleſs Serjeant Hawkins, has cited it in his book, as an authority to the contrary. One ſingle determination, in oppoſition to allowed principles, and to common ſenſe, is of no avail, let the name of the judge be ever ſo reſpectable. A late determination upon a variance in libel was moſt certainly contrary to law, where 28 and 'pound' ſhould have been 28th and 'pounds,' and yet was ruled in favour of the defendant, by a learned and ingenious judge who could not be ſuppoſed to incline in behalf of a ſlanderer. The law ſays that any variance is fatal. But this means that "where a letter omitted, "added or changed makes another word, it is a fatal va-"riance; but that it is otherwiſe where the word continues "the ſame. And ſo it was adjudged in the Queen againſt Drake, reported by Salkeld." Indeed ſo reaſoning, without any caſe, would teach a man to expound ſuch a general rule. I take notice of this recent incident, not merely for the ſake of vindicating the law from any ludicrous reproach on ſuch account, but to ſhew that a ſingle caſe in a popular point is not to be held ſacred without examination; for, were it ſo, few names would weigh more with me than that of the perſon alluded to, whoſe works will for ever be an honour to himſelf, as well as to the profeſſion itſelf. But modeſty on firſt coming into office, fear of

party virulence and the hurry, of an aſſize, may apologize for a ſlip in a very able young magiſtrate, eſpecially where he errs on the merciful ſide, by too literal an adherence to rule; when a violent determination, made deliberately by a forced conſtruction and methaphyſical reaſoning, in oppoſition to the letter and meaning of plain legal principles, and of prior adjudications by conſummate judges, cannot be excuſed or vindicated in an old chief juſtice. The calling of ſuch a determination a caſe in point, is treating law as if it were to be determined by the letter, and not the ſenſe of a caſe, ſyllabically and not upon principle.

I cannot reſpect a grand juſticiary for allowing even an outlawry to be reverſed upon a ſilly, futile, pretended uncertainty of expreſſion; but I ſhould reverence him ſtill leſs, if, on ſome other occaſion, he ſhould ſupply by ſurprize and conſtruction a fact not found by a jury. Becauſe ſuch contrariant conduct would make me ſuſpect that he would adhere literally or depart ſubſtantially from any rule, as his inclination, fears, or intereſt might lead him.

By the way, I am told that ſpecial pleading is nearly kicked out of doors, owing to a recent diſcovery, that juſtice is much more likely to be had, when parties come to trial without the one knowing for certain what the other intends, than when both the charge and the defence are preciſely ſet forth, and nothing can really go to iſſue, but what ſhould do ſo; and at the trial no ſurprize can poſſibly take place of either ſide, or in any reſpect. This will, in ſome meaſure, as I ſhould divine, prevent the aſcertaining hereafter of what was in any particular inſtance litigated and tried, that is, one cauſe and determination from being a rule for another, and will of courſe ſubject more to the fancy, and diſcretion, both of judge and jury, and by that means, leave all our poſterity more at large in their rights, than they would otherwiſe be, to the great ſatisfaction no doubt of the litigious, and to the certain emolument of the bar. Seeing therefore, that juries will amplify their dominion in this quarter, and gain to themſelves the deciſion of many a ſuit, which, but for this, ſome legal demurrer would have carried directly to the bench and finally cloſed; it might perhaps be fairly expected, that juries ſhould in return waive ſome of their ancient privileges in other reſpects, and not be over-reſty if any ingenious judge ſhould, on proper occaſions, be willing to give nay to interpoſe and obtrude,

by

by right of conſtruction, his ſenſe for theirs in the verdict. Reciprocity is equality, and one good turn deſerves another. We ſhall all be 'in equilibrio' again. Where then is the harm done?

When I was firſt entered, as it is called, of the law, ſoon after leaving the Univerſity, and before my father and elder brother died, I took advantage of the liberty given me to purchaſe law books, for furniſhing myſelf with the beſt editions of all ſorts of books, year after year, and by what I lately learned from a legal gentleman of my acquaintance, it was money the beſt laid out of any that I ever purloined under various pretences from my progenitor. For, according to this ſame communicative coffee-houſe acquaintance, there is now an abſolute monopoly eſtabliſhed in books. The propietors of the copy, whether author, or bookſeller, may print their books on the worſt type and paper imaginable, and you cannot procure any other edition, it being forſooth their property as much as their ſtock in the funds, or their patrimony. The ſtatute of Queen Anne, entitled "an "act for the encouragement of learning, by 'veſting' "the copies of printed books in the authors or purchaſ-"ers of ſuch copies, 'during the times' therein menti-"oned," taking notice of the practice of you, bookſellers, in reprinting books, and other writings, without the conſent of the authors or proprietors, to their very great detriment, and for preventing ſuch practices for the future; and "for the encouragement of learned men to "compoſe and write uſeful books, enacted, that the au-"thor or bookſeller, who purchaſed the copy of any "book, 'ſhall' have the ſole right and liberty of printing ſuch book for 21 years, from the 10th of April "1720." Until lately it was conceived that this act 'veſted,' according to its title, a property which did not exiſt before, during the times therein mentioned, and that the part enacting ſuch perſons 'ſhall' have the 'ſole right' of reprinting for 21 years, imported the creation of a future right, from April 1710, to the ſole publication for the ſpace of 21 years, which at the end of that period was to ceaſe, and which was in oppoſition to, and for 'preventing' the 'general' right of reprinting, that every body was then in poſſeſſion of. But, as this legal man told me, the whole was a miſtake; however, it was excuſable enough, in ſuch a perſon as myſelf, for Mr. J. Yates had died of the ſame opinion. My friend affirmed, there was always ſuch a thing as literary property and

copy-right 'at common law,' altho' nobody had diſcovered it, and altho' the makers of the ſtatute of Q. Anne, having no ſuch idea, had taken no notice of it, and had taken no notice of it, and had inadvertently uſed expreſſions that implied the contrary. And, if I would but think of it, I ſhould find the doctrine to be as ſound, and the proof as plain, as that of the divinity of the legation of Moſes, from the mention of no future ſtate; that I had probably heard of *lucus à non lucendo*, and of revelations *à non revelendo*; and this was clearly a deduction of the ſame kind. They were both modern diſcoveries of great wits and ſcholars. After this I durſt not alledge the common definitions of property, or talk of occupancy, &c. the practice of all nations, the uſage of our own, common ſenſe, and the grammatical import of the ſtatute; but I ventured to aſk, whether the power given by that ſtatute, to certain great officers, to regulate the price of books, extended only to authors who claimed the benefit of the ſtatute; and whether the ſaving clauſe therein for the univerſities, would vindicate their printing hereafter books whoſe authors could be found out? He made me no anſwer. Whereupon I ſaid, that I ſhould imagine the regulating clauſe as to price, could only operate upon the right conferred by that act for 21 years, for the act muſt merely intend to regulate the uſe of the property which it gave, and not to abridge any right before exiſting; and if this were ſo, the authors who did not crave the aid of the ſtatute, or whoſe books had been publiſhed for a longer time than the ſtatute gave a ſole right to their copy, might ſell their books at any price ever ſo exhorbitant, and could not be prevented, let the inconveniency to the publick be ever ſo great. Finding this drew nothing from the gentleman, I deſired to be informed, whether the inventors of medicines, machines, bridges, painters, drawers, ſculptors, architects, had likewiſe an excluſive right to the copy of their works. He ſaid, no, for *diſtinguendum eſt*, *domine*, and then entered into niceties, far beyond thoſe of the learned jeſuit 'Paſcal's Provincial Letters.' Not comprehending him at all, I aſked whether the invention of a muſical inſtrument, a knife, a wheel, a lever, a pump, a ſhip, a compaſs, a teleſcope, a watch, &c. &c. &c. were not as ingenuous, as original, as uſeful, as laborious diſcoveries by the mind, as excellent productions of the thinking, rational faculty, and as noble thoughts as thoſe which are exhibited in the 'divine legation,' the 'alliance

'between

'between church and ſtate,' the notes upon Pope, or even the 'notes upon Shakeſpear,' taken, accumulatively' if he pleaſed? Does the execution of the former in braſs, iron, wood, ſtone, canvaſs, &c. render them leſs valuable? Is there any intrinſic preference in paper and ink? Cannot ſome of the moſt uſeful mechanical inventions be imitated and multiplied with as much eaſe as the copies of books? Is not a monopoly for 21 or 28 years a ſufficient recompence to the author? 'Muſt' his family or their aſſigns for ever enjoy it? The learned perſon exerciſed anew his faculties of diſtinguiſhing, but I remained little the better for what he ſaid, and was fain to put up with the fact, being utterly incapable of bearing away the reaſon. The eſſential difference between the invention of the mechaniſt and the writer, ſo that one ſhould conſtitute perpetual tranſmiſſible property, and the other not, I could no more apprehend, than the utility reſulting from rendering either ſo in ſociety. More of my ſenſes, I thought, teſtified in behalf of mechaniſm, than of writing. However to put an end to this jargon, I ſaid that the printers and booksellers, who would gain ſo much by this determination, at the expence of the reſt of the world, muſt be unreaſonable fellows indeed, if they any longer pretended to be ignorant of the meaning of what they publiſhed and vended, and were not now always ready to anſwer for the contents when judicially called upon ſo to do. They had their 'quid pro 'quo.' Ignorance of ſuch property would be inexcuſable. They ought to pay for the thoughts, ſeeing they make part of their legal eſtate. And, I begin to think, upon this ground it is nonſenſe to pretend that they don't know what is the true application of every word, letter, aſteriſk, or blank. The learned bench, however muſt on their part, admit that theſe thoughts being property, and tranſmiſſible for ever, muſt be ſomething in fact, and therefore, their nature and qualities may as well be ſubmitted to the judgment of a jury, as thoſe of an horſe. Some jockeyſhip may be uſed in the traffic with either, but a clear ſighted jury will not be cheated by idle pretences. It is really odd, that when thoughts have been reclaimed, like animals, from their wild nature, by being confined, and incloſed within paper and books, and have been adjudged to be private property at common law that it ſhould be denied that juries can try this ſort of property! I do not, Mr. Almon, underſtand it, altho' I

dare

dare ſay, you do, and will for that reaſon be unwilling to publiſh what I ſay. However, it will do you no harm.

So many ſtrange conceits are abroad, that I am really afraid to let out my obſolete notions. New law, new hiſtory is every day appearing; the two laſt things, one would think, that ſhould produce novelties, but ſo it is. And I read not long ago in a faſhionable hiſtoriographer, that religion, law, or forms of government, were not of much conſequence, the whole lay in the adminiſtration of them, and that was the beſt which was the beſt adminiſtered. For which reaſon I preſume this celebrated writer deems it not neceſſary to be ſcrupulouſly exact in what concerns them. Indeed, Mr. Hume, the hiſtorian, inſtead of relating actions, matters of religion or politics, drawing characters, accounting for events, or repreſenting the conſtitution, like all other writers before him, ſtrives to give the whole in a different way, and having a good deal of ingenuity, has ſo far ſucceeded as to give another turn to almoſt every thing, inſomuch that his hiſtory is neither the true ſtory of this country, nor does any man of knowledge look upon it as ſuch. It is indeed ſaid, that new conceits with reſpect to law, religion, or hiſtory, are much to be diſtruſted; they dazzle at firſt ſight, raiſe a notion of the ſtarter, and make a noiſe, but generally in the end turn out mere *ignes fatui*. In law and hiſtory I confeſs I am for no novelties; let the modern Scottiſh doctors and profeſſors of morality, one after the other, like the old ſchool ſubtilizers of divinity, ſpin what theories they pleaſe. It is indeed indifferent to me what they may write, who am not bound to read any of them. But I ſhall not be paſſive when new-fangled legal conceits come forth in practice. I cannot willingly quit my ancient conſtitution and law, nor eaſily be perſuaded that till within theſe laſt ten years we ever underſtood the true principles of either.

According to Mr. Hume, there was no idea of liberty in this country until the acceſſion of his countryman James the 1ſt. Thoſe who framed *Magna Charta*, or got it ſo often confirmed under Edward the 1ſt, the makers of the ſtatute of treaſons under Edward the 3d, Lord Chancellor Forteſcue who wrote upon abſolute and limited monarchy under Edward the 4th, Lord Chancellor More who compoſed the republic of Utopia under that of Harry the 8th, and all the Judges of England who in Queen's Elizabeth's time reſolved, that the *Habeas Corpus* was, and had ever been, a writ of right for

ever

every ſubject by the common law of England——— Were perſons without ideas of liberty, according to this ingenious Scotch gentleman, who I dare ſay does not know that we have no other Habeas Corpus law now in term time, and that the act of Charles the 2d was only to render it grantable by any judge in vacation. Had this paradoxical writer entitled his work, 'Curious Relations of ſuch Engliſh Affairs as moſt deſerve notice, with ſingular Obſervations thereon,' nobody would have expected a complete faithful hiſtory of the whole, and every body ſhould have read what he wrote. But as it is, it may deceive the uninformed reader, who can never learn truth from him, although he may the art of writing what is not ſo.

The ſame refined wit gave no bad ſpecimen of his turn for the extraordinary, when in remarking upon ſome ſuppoſed errors of Mr. Locke, in his treatiſe of the human underſtanding, he coldly and ſhortly obſerved in a note, that it is probable Mr. Locke was led into theſe miſtakes by the ſchoolmen; from whence any common reader would conceive that Mr. Locke had dealt much in thoſe writers, and relied greatly upon them, whereas his principal deſign was to expoſe their ſubtleties and method of writing; and he every where profeſſes a thorough contempt of them, and teaches mankind how to get rid of the ſhackles they had laid upon the underſtanding, and fully and fairly to uſe his own.

This philoſophical doubter, in a 'Treatiſe on human nature,' aſſerts, that "naturally ſpeaking there is no "more harm in a ſon killing his father, than in a young "oak's growing up and killing its parent ſtock;" without ever once taking into the account that which conſtitutes the eſſential difference between them, the reaſon and freedom of action in the one, which the other wants. But where the love of paradox prevails, it is no uncommon thing to paſs by much greater conſiderations than theſe. A ſound and a ſubtle underſtanding are very different things. Who therefore need be ſurprized at his diſcovering Mr. Locke to be a looſe reaſoner, and Bacon no very original genius!

Pardon me, Mr. Almon, for diverging ſo much from my ſubject. I haſten to a concluſion. Many of my latter paragraphs are, I confeſs, very wide of my original deſign. But this need break no ſquares betwixt us. The ſale of the pamphlet will not be hurt by ſuch an accumulation of different matters; they will all ſerve to

make

make a tail for flying the kite with. It will catch the eyes of more ſpectators, I warrant you, on that very account.

Were it indeed the cuſtom for judges themſelves to print their own judgments eſpecially in new caſes, (and why it is not I cannot tell) you would not have been troubled with theſe obſervations. I wiſh to have this made a duty of their office. At preſent, I am always uncertain whether what is printed be a faithful report or not; it comes with no authority, but from ſome private hand; and therefore I think myſelf at liberty to treat it like any other publication, which were the judges themſelves to put it forth, I could not ſo well do. But until they will let us have the genuine, authentic judgment of the court, there is no great impropriety in my endeavouring to take off all weight from what is circulated as ſuch, and ſeems to be exceptionable in many reſpects. How can the law be aſcertained without ſome legal gazette by authority? All may be ſpurious, or all may be true, for what the poor layman may know. There have been ſeveral judgments given of late days, which I have wiſhed to come at, but never could. There was one in particular in the Common Pleas about the ſeizure of papers, which ought to have been publiſhed, but was not, and of which I could never get even a note. None of the great magiſtrates of our time have printed their judgments, neither Lord Hardwicke, Lord Mansfield, nor Lord Camden; but on the contrary have prevented their coming abroad as much as they could. A ſingle expreſſion is frequently material. And, if what they pronounce from the bench be law, why is it not to be promulgated as ſuch for the benefit of the ſubject at large? Let any one look into the various reporters, and ſee how they differ in the relation of the ſame caſes. In the law courts, the puny judge might certainly report yearly all the new caſes. They would not be many. And after ſubmitting them to his brethren, and their adjuſting them according to their true meaning, they ſhould all ſign this annual report, and be anſwerable for it, and the ſame ſhould be printed for the information of the world. Until this be done, I ſhall never treat any report with implicit reverence. And ſo, Mr. Almon, I wiſh you good night, &c.

POSTSCRIPT.

POSTSCRIPT.

PERMIT me to add a word touching commitments and attachments for a contempt of court; the late caſe of Bingley having raiſed the curioſity of many people and excited their ſurprize. It is the power and the mode of proceeding which I mean to conſider, and not Mr. Bingley himſelf, who has been the publiſher of all ſort of libellous traſh, and deſerves no countenance from any man of liberal education or principle. There are many circumſtances attending this ſummary proceeding, which I cannot ſquare with the maxims of law or natural juſtice. And yet the late caſe of Bingley is ſingular in nothing but its termination.

I take it that any diſobedience or oppoſition to, or miſuſer of, the proceſs or orders of a court of law is puniſhable by immediate commitment, becauſe no court can either maintain or execute the truſt repoſed in it by the conſtitution, without ſome penal compulſion on the party ſo offending. An attachment ought to go directly. The juſtice of the kingdom would otherwiſe ſtand ſtill. Every perſon is intereſted in there being ſuch a vindictive power. It flows of neceſſity from the nature of a court of juſtice, and is eſſential to it, as it could not do its duty without. This power or prerogative is therefore a neceſſary incident to it at common law; and there is no ſtatute or poſitive law, nor any requiſite, to warrant. Wherefore if any party to a cauſe, officer of the law, or other perſon, obſtruct the execution of proceſs, or the proceedings of the court, or hinder others from conforming thereto, do otherwiſe than is enjoined or commanded by their precept, or forbear to do what their proceſs, rule, order, judgment or decree require, he ought to be forthwith attached. And for this reaſon the old law, as cited by Broke from the year books, ſays, "contempt ſhall be anſwered in proper perſon, and not by attorney."

However, Lord Ch. B. Gilbert (or Bacon the abridger) not attending to this neceſſity for ſuch power, and finding that libels were called now-a-days contempts, ſeems to be at a loſs how to reconcile immediate attachment with the principles of the conſtitution, and with the grand charter, which ſays, *Nullus liber homo impriſonetur, niſi per legale judicium parium ſuorum, vel per legem terræ*, and therefore ſuppoſes long practice alone ſecures its footing in the law. He has been miſled by aſſociating the lawful attachment for actual, with the unlawful for conſtructive contempt. The former is abſolutely, neceſſary for the maintenance of public polity, and therefore legal; the other is unneceſſary, warranted by no poſitive law, and therefore illegal. The latter is indeed a dominion ſo extrordinary, ſo alien from the conſtitution of his country, and ſo privatory of the ſubject's right to a trial by jury for every miſdemeanour, that it claſhes with the whole ſyſtem of our law. Without an immediate power of coertion, where proceſs is reſiſted, the courts could not go on. But in all other other caſes no puniſhment can be inflicted but through the medium of a jury. With reſpect to courts martial, &c. they derive their exiſtence from ſtatute, as well as the ſtanding forces which they controul. There is indeed in Fitzherbert's Natura Brevium no mention of any attachment but for the furtherance of juſtice and the reſtraint of injuſtice, which could not be if the uſe of it now contended for were either common or legal. However as oppoſition to proceſs implies contempt, and a deſpiſing of the authority and dignity of the court from whence it iſſues, this may have given riſe to a notion that every thing which betokens any ſlight or diſapprobation even of the ways of reaſoning or demeanor of any judge, is likewiſe a 'contempt of the court' within the meaning of the law by that term, and will enable them to attach a party guilty thereof, although ſuch ſlight or diſapprobation of their ſentiments or conduct be expreſſed merely in diſcourſe, or in ſome publication of the preſs, and does not actually interrupt or diſturb their judicial proceedings. But this, I apprehend, is a groſs miſtake, and an abuſe of the power of attachment, which is permitted to them from nothing but abſolute neceſſity. Upon that ſcore alone this penal authority begun, has been practiſed, and can be eſtabliſhed as part of the law of the land. For, "it ſhall not lie in any one's

"power

" power to defeat the rules of a court of juſtice, or " to render them ineffectual; nevertheleſs the contempt " muſt be certain, and not doubtful; for elſe a party " may perchance be wrongfully committed, which the " court will be cautious not to do." In three words, a contempt of the court means ſome efficient contempt of the law, that is, a withſtanding of its proceſs, and not an idle contempt of the perſons, underſtandings, or demeanor of its temporary officers, expreſſed out of court merely in words, whether written or unwritten. It is the defeating of the proceedings of the national courts, by an aſſault upon the judges, parties, or juries, or by raiſing ſuch a diſturbance as to prevent juſtice being fairly and ſoberly done; or elſe the defeat by ſome means or other of their proceſs. And it is nothing elſe.

The ſuppoſing of a man to be ameſnable by attachment for any conſtructive contempt which does not impede legal proceedings, is as foreign to the idea of this conſtitution, as the ſuppoſal that a man can be bound to ſurety of the peace for any thing (before judgment) but actual violence; that is, for any conſtructive breach of the peace. They both proceed upon the ſame principle; the abſolute neceſſity of ſomething being done immediately; the one for the prevention of interruption to national juſtice, the other for the preſervation of the lives and properties of individuals. The great prevailing luminary of the law, in his preſent peri tion, ever looking at the principles of things, will not (I truſt) diſeſteem this way of reaſoning. Indeed, I ſhould gueſs he would treat the notion of conſidering any penman, printer, or bookſeller (under the arbitrary denomination of a libeller,) as an actual breaker of the peace, or as an actual contemner of the court, as a deluſion, 'vox et preterea nihil;' and would tell the perſon who ſhould argue to that end, and deſire an attachment, that there was no force, or violence in either, but what was the work of fancy, a mere 'luſus' of the imagination. It is indeed only by conſtruction, and as having an evil tendency, that the one is ſtyled a breach of the peace, and the other a contempt of the court, in the track of legal diſcourſe. The man who writes abuſively, intends, perhaps (though I believe rarely) to create ſome public diſturbance; and he who traduces, reflects upon, or calls in queſtion the juſtneſs of any judgment, may, be ſuppoſed to aim at diminiſhing the authority of the court, or of the perſons of its

judges; but not being immediate outrages, or the uſe of force, either to ſubdue any individual, or to withſtand the execution of any law, they do not require inſtant ſuppreſſion, and may well wait for a trial by jury, whoſe buſineſs it will be to conſider both the tendency and intent of the arraigned words or writings, and to pronounce whether the ſame be adviſed, malicious and contrary to the peace of our lord the king, and the good order of his realm; or no more than pertinent and juſt remarks on the errors and malefeazance of his political miniſters or law-magiſtrates. In general they are the products of hackney writers for the ſake of a livelihood.

There cannot be a juſter definition of a 'contempt' than my lord Coke's, which ſays, "this word is uſed for "a kind of miſdemeſnor, by doing what one is forbidden; "or not doing what one is commanded." And by old judge Croke's Elizabeth, it appears that, "one may "be impriſoned for a contempt done in court, but not for "contempt done out of court, or a private abuſe."

I much doubt whether this proceeding by attachment for a conſtructive contempt of the court be very antient; I mean for writing or ſpeaking degradingly, irreverently or contumaciouſly of their perſons, or their judicature. My lord Vaughan, in Buſhell's caſe, takes notice of two or three caſes; but I think one may gather from what his lordſhip ſays, that he muſt have adopted our notion, or he would otherwiſe ſcarcely have approved what was done therein.

"One Aſtwick, brought by 'Habeas Corpus' to the "King's-bench, was returned to be committed 'per man-"datum Nicolai Bacon militis, domini cuſtodis magni "ſigilli Angliæ, virtute cujuſdam contemptus in curia "cancellarii facti,' and was preſently bailed, the return "being too general."

"One Apſley, priſoner in the Fleet, being brought up "on Habeas Corpus, was returned to be committed 'per "conſiderationem curiæ cancellar. pro contemptu eidem "curiæ illato,' and upon this return ſet at liberty."

Lord Vaughan ſays, "in both theſe caſes no inquiry "was made, or conſideration had, whether the con-"tempts were to the 'law court,' or 'equitable court of "chancery,' either was alike to the judges; leſt any man "ſhould think a difference might ariſe from thence."

"The reaſon of diſcharging the priſoners upon thoſe "returns was the generality of them being for contempts "to the court, but no particular of the contempt expreſt,

"whereby

" whereby the King's-bench could judge, whether it " were a cauſe for contempt or not."

" And was it not ſuppoſeable, and much to be credit- " ed, that the 'Lord Keeper and court of Chancery' did " well underſtand what was a contempt deſerving com- " mitment, and therefore needed not to be revealed up- " on the return ?"

The ſame Chief Juſtice, in the ſame report mentions likewiſe the following caſe, which very ſtrongly confirms what we have ventured to advance.

" George Milton, impriſoned for 'contempt, ſcanda- " lous words of the court,' and convicted of 'drunkenneſs;' " the cauſes were reſolved to be inſufficient, and there- " fore 'dimittitur à priſonâ,' and the goaler diſcharged of " him ; but he gave bail to attend the pleaſure of the " court."

My doctrine is ſtill corroborated by the caſe of " Wil- " liam Allen, who was brought up from the fleet on a " habeas corpus, and the warden returned, that he was " committed 'per T. dominum Elleſmere dominum can- " cellarium pro contemptu in non performatione cujuſ- " dam decreti in eodem curiâ facti, 3 Feb. anno 11 re- " gis, nunc in cauſa adtunc ibidem dependente inter E. " Wood, querentem & dictum Allendef.' And on this " return the court refuſed to deliver him."

Theſe caſes happened in the reigns of Queen Elizabeth, and James the 1ſt, and are to be met with (excepting Milton's) in Serjeant Moore's reports,* where are ſeveral inſtances of perſons delivered by the K. B. who had been committed for contempts of decrees, and orders of the privy council and court of requeſts. From whence may be collected how ſtrict the K. B. then was in requiring a ſpecification of the contempts, for which the commitment had been, that they might judge thereof.

There are ſome ſtrange inſtances of commitment by the Court of Chancery, in the caſe of marrying infants, which perhaps would not be deemed a ſufficient cauſe by the courts of law, if returned on a Habeas Corpus. There is one in the caſe † of a girl married without conſent of her guardian, although ſuch guardian, was not appointed by the court.

The Chancery exerciſes this power, not on bill only, but on petition, as being the delegate of the king, who, as 'pater patriæ,' is ſaid to have the care of all infants lodged in him; and, in committing the offender, they imitate

* Moore 820, 840 † 2 Wms. 118

imitate the courts of law, which under the old writ of raviſhment of ward, took cognizance of this offence, and inflicted commitment as a part of the puniſhment, that is, they pronounced a ſentence of impriſonment. And treapaſs or raviſhment of ward is the proper legal ſuit for the purpoſe, and is the mode of obtaining remedy preſcribed by the ſtatute of the 12th of Charles the II. which was drawn by Lord Chief Juſtice Hale. However, when a ſimilar application was made to Lord Chancellor King, he ſaid "the infant girl never having been under the care "of the court, nor committed by the court to the cuſto-"dy of the defendant, I do not think this an immediate "contempt of the court; but then it is a very ill thing "in the guardian to marry this child to his own ſon, and "puniſhable by 'information;' and I will have this "guardian bound over with ſureties, to appear and an-"ſwer to an 'information' to be exhibited by the attorney "general againſt him; and let the child be delivered "over by this knaviſh guardian this afternoon, or *other-"wiſe* to ſtand committed."* A very ſenſible order, as it ſeems to me, and conſonant to the law.

But all theſe caſes go upon the principle of that contempt, which is a real reſiſtance to the orders of the court, in actually taking away the infant, who is either ſpecially its ward, or otherwiſe is regarded as ſuch by the police of the realm. This abduction, or ſeduction, therefore is an actual violence done to the general law of the kingdom, which the king (by his Chancellor) as father, guardian, and conſervator of all infants, is compelled to put an immediate ſtop to.

In Lilburn's caſe,† the proceedings were cancelled by parliament, and pronounced to be illegal; and yet he certainly had printed and publiſhed in defiance of an 'order' of the court of Star-chamber. My Lord Chief Juſtice Holt, in the 'Queen againſt Langley,' ſaid that "words *contra bonos mores*, ſpoke of a magiſtrate *in court*, "is a contempt for which he may be fined." Whether he means by the ſummary method of attachment is not clear, but, if he does, his meaning muſt be, provided the words were ſpoken of him, in his preſence, whilſt ſitting in judgment, ſo as to be an actual interruption to the proceedings of the court.

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* Wms. 562. † See Ruſhworth.

I queſtion whether the practice of attaching for contempts out of court by writing, or otherwiſe, can boaſt many precedents; but whether it can or not, it appears to me to be contrary to the ſpirit and genius of our legal frame. No inſtance occurs to myſelf prior to that of * Wyatt, the bookſeller, for publiſhing a Latin libel. He ſaid he did not underſtand Latin, and named his author Dr. Middleton. Whereupon an attachment was moved againſt the Doctor, for writing a libel on Bentley, a doctor of divinity in the Univerſity of Cambridge; in a Latin preface to a book about the library of the Univerſity; dedicated to Dr. Snape, then Vice-Chancellor. Middleton came into court voluntarily, and confeſſed he was the author, which being recorded, he was fined 50l. and ordered to find ſureties for his good behaviour. This I have read, but without knowing to this moment upon what legal bottom ſuch a caſe can be ſupported, and yet I ſtate it from the report of a judge of the court, at the time;† and conceive that the ſaid publication contained likewiſe a libel upon the court of King's-bench, although Lord Forteſcue has omitted to ſtate that material circumſtance.

If this be the firſt caſe, the practice is not immemorial, and little in my humble opinion can be for it.

There is no poſitive law for attachment pretended: It is grounded on nothing but the right inherent in all courts, to puniſh for a contempt of their authority, by immediate commitment. And the very reaſon of the thing ſhews, that this contempt muſt be a reſiſtance, in fact, of its authoritative mandates, ſo as to prevent its doing juſtice through the kingdom.

As the life of a man, or his property, may be deſtroyed by an actual breach of the peace, ſo the being of a court of juſtice ceaſes the moment that its authority is baffled; and therefore, in both caſes, force muſt be immediately had recourſe to in order to ſuppreſs counter-force. The vitals of a court, an individual, and property, if in imminent danger, muſt be inſtantly ſecured *manu forti*.

The vulgar ſenſe of the word contempt, has created the confuſion. All contumacy of, or contumely upon the perſon, expreſſions and ſentiments of a judicial officer and magiſtrate, by word of mouth or writing, is in com-

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* 8 Mod. 123. † Forteſcue's reports, 210.

non parlance a contempt; but it is no actual withſtanding or defeating of the proceeding of courts of juſtice, to which the name in a legal ſenſe is applied, and for which alone an attachment ſhould go. Nevertheleſs, every undue diſparagement with tongue or pen of the public tribunals, or the men that fill them, I wiſh to have puniſhed. It is, if any thing be, the proper object of the information *ex officio*. In God's name, let the treatment of any judge, or of any judgment, with cauſeleſs banter, ſatire, ſcorn, reproach, or ignominy, and the libelling or calling of either needleſsly in queſtion, be ſcourged with this bitter rod of criminal vengeance. But the ſuppoſed offender, ſhould not, nay cannot, be deprived of, or puniſhed without, his trial by jury. The detenſion of a libeller in priſon, indefinitely, under the colour of contempt, without having paſſed ſentence of impriſonment, is I conceive illegal. His offence, if proved to the ſatisfaction of the jury, upon indictment, information or action, deſerves to be highly puniſhed. But, as it does not ſtop the procedure of the juſtice of the kingdom, it is not like an aſſault upon the court during a trial, the repulſion, eluſion or deſtruction of proceſs, a fraudulent uſe of, or the prevention of obedience in others to it. And, therefore, no reaſon *ex neceſſitate rei*, can be given for a departure from the conſtitutional mode of purſuing ſuch, more than other affronts, unleſs it may be by appropriating the information *ex officio* to this ſpecial purpoſe, becauſe judges conduct ought to be more irreproachable than that of other men. If the libelling of them be more pernicious, let the puniſhment of thoſe convicted fall the heavier. But theſe, in my opinion, will be diſtinctions enow. Beſides, there is a weighty objection againſt the exerciſe of this power of attachment by the court, where national juſtice can go on without it, which is, that the court libelled will be party, proſecutor, and judge; three characters that ſhould not meet, where it can be avoided. The frailty of human nature will bear me out, in ſaying, that under ſuch circumſtances the judicature cannot be impartial and indifferent, which is the firſt requiſite in the exerciſe of criminal juriſdiction.

Is it not, moreover, poſſible that judges may ſo execute their offices, as to raiſe juſt apprehenſions of their turning the law to the oppreſſion of the ſubject, eſpecially in crown-proſecutions; and that their ways of compaſſing this may afford juſtifiable grounds for animadverſion, and for the controverting of the conſtitutionalneſs of their adjudi-

judications? The remarks of Sir John Hawles upon ſeveral ſtate trials, prior to the revolution, were thought to be moſt material and juſt: they were of great ſervice at that period, have ſince been conſtantly printed in the collection of ſtate trials, and tho' very ſevere, are not deemed any abuſe of the preſs, but a true uſe of it.

Where what I do does not in fact interrupt or diſturb the proceedings of a court, I will deny the legality of its power to attach me. No judge has a right, by that terror, to ſhut my mouth, or to prevent my pen from cenſuring what I think erroneous in his diſtribution of public juſtice. At the ſame time, no man reverences the preſent ſet of judges more than myſelf, ſincerely believing, that few periods of time have produced men of more ſcience upon the bench, of more integrity or underſtanding, inſomuch it it would be difficult to make a change for the better, unleſs you could pick out another Yates from the bar. I honour their offices as the moſt beneficial of all to a free ſtate, and therefore I think they ſhould be, if they are not, rendered worthy the acceptance of the firſt men in the profeſſion. Nevertheleſs, I will never ſubſcribe to the putting them above the inſpection of their country. Power and anthority, without check, may induce men of honour to be more arbitrary than they ſhould be; and I can eaſily imagine, that very extraordinary men may be poſſeſſed of prerogative and ariſtocratical notions, which may be extremely pernicious to ſuch a common-wealth as ours. If they can introduce and eſtabliſh for law their own ways of thinking, by ſolemn judgments from the bench, the moſt dangerous *dicta*, may, when ſecure from the reviſion of the public, become by time reſpectable and venerable, and be hereafter alledged as precedents, and the real eſtabliſhed law of the realm. Let no man, therefore, whilſt a parliament ſubſiſts, ſubmit to be attached, at the will of any court, for having merely been guilty of contemptuous writing, and have no alternative left, but that of anſwering their interrogatories, or being impriſoned as irrecoverably contumacious for life. Unleſs ſuch perſon has withſtood their proceſs, and 'actually' reſiſted their legal authority, let him not, without making complaint to the commons aſſembled, be attached at all, for a moment. No conſtructive denial of their authority, dignity or uprightneſs, will be a warrant for ſuch attachment. Let them proceed by due courſe of law, and put the preſumed malefactor upon his trial, by information; no man ſhould be

above controul, or out of the reach of puniſhment, in ſome way or other.

I have been the more large upon this head, becauſe it is ſaid, that attachment is a proceſs which iſſues at the diſcretion of the court.

Having ſaid thus much, to evince what I take to be the contempt, for which an attachment is ſolely warrantable, I ſhall now take the liberty of conſidering curſorily the mode of proceeding under it, wherein are ſome things, which I cannot reconcile to my legal notions.

It may be awarded by the court, it is ſaid, upon a bare ſuggeſtion, their own knowledge, or upon affidavit, without any appeal, indictment or information, and may be executed on a Sunday. The party ſerved with the writ, muſt enter into a recognizance to appear at its return. Indeed, if the offence be done in court, and appear from confeſſion, view of the judges themſelves, or examination, the court may record the crime, and commit the offender directly for judgment. But there is uſually no more than a rule to ſhew cauſe, unleſs the contempt be of a flagrant nature, and poſitively ſworn to; in which caſe the party is ordered to attend in perſon, as muſt every one againſt whom an attachment is actually granted; and if he ſhall be apparently guilty, the court in diſcretion will either commit him immediately, in order to anſwer interrogatories, to be exhibited againſt him, concerning the contempt complained of, or will ſuffer him to enter into a recognizance to anſwer ſuch interrogatories. If he fully anſwer, and can ſwear off the contempt, he is diſcharged, and the proſecutor may proceed againſt him for perjury, if he ſee cauſe. Ignorance of the law, will be no juſtification of any illegal act, but may be offered in mitigation. If he deny part of the contempts, and confeſs others, he ſhall not be diſcharged as to thoſe denied, but the truth of them ſhall be examined; and if his anſwer be evaſive, as to any material part, he ſhall be puniſhed in the ſame manner, as if he had confeſſed it.

The court, it is ſaid, will not now bail a man taken up for a contempt, unleſs he give ſecurity to anſwer interrogatories.* Formerly, the parties own recognizance

* See Barnadiſton's reports.

uſed to be thought ſufficient, but of late years two ſureties have been inſiſted upon. The interrogatories muſt be tendered to him within four days, or he may move to be diſcharged. But, by the practice, they need not be filed, till ſo long after ſureties given, unleſs the party be in cuſtody, when no ſecurity at all is requiſite.

With reſpect to courts of equity, it is ſaid, that 'the chancery' never ſuffer perſons to be examined on interrogatories to bring themſelves into contempt. But, where a contempt is expreſsly ſworn againſt them, will give them leave to be examined by way of purgation, on perſonal interrogatories, in order to clear themſelves.* Indeed, if the contemnor deny the contempt, the proſecutor may take out a commiſſion to examine witneſſes to prove it, and the contemnor ſhall be permitted to name no more than one commiſſioner, not to examine any witneſſes at large for himſelf, but be confined to the croſs-examination of the proſecutors. On 'proper' affidavits indeed, the court will indulge the contemnor with the liberty of examining witneſſes to particular points. However, my Lord Chancellor King declared, he thought the rule very hard, and as the proſecutor might examine one in contempt on interrogatories, he ought to be content with his oath. 'The Exchequer,' in caſes of very great contempt, where a party is examined on interrogatories, and denies it, have given liberty to the proſecutor to examine witneſſes to 'falſify' this denial.†

The courts of equity, therefore, are leſs merciful to a ſuppoſed criminal than the courts of law, where no teſtimony is received to falſify the examination of the party; and, in truth, Lord King might well ſtare at ſuch a practice obtaining in chancery.

The recognizance, ſecurity, fine, and impriſonment in 'contempt,' are all at the diſcretion of the court, that is, *ſecundum diſcretionem boni viri*. And to the queſtion *Vir bonus eſt quis?* the anſwer ſays, *qui conſulta patrum, qui leges, juraque ſervat*. But, by what we have ſeen, there is no preciſe rule in the caſe and the whole is pretty indeterminate, not only the puniſhment, but the evidence and the examination. Now, according to Lord Chief Juſtice Camden, "Diſcretion is the law of ty-

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* See Moſeley's reports. † Bunbury's reports, 244.

" rants, it is always unknown; it is different in different " men; it is caſual, and depends upon conſtitution, tem- " per, and paſſion; in the beſt, it is often times caprice; " in the worſt it is every vice, folly, and affection, to " which human nature is liable." For my own part, being one of the people, I adopt the notion of the old Romans, who (according to Tully) ſaid, *populariter loquendo lex eſt, quæ ſcripto ſancit quod vult, aut jubendo aut vetando.*

This Engliſh inquiſition is carried on much like the foreign. For the defendant having entered into a recognizance, and giving ſureties to anſwer interrogatories; ſo ſoon as they are prepared he is ſerved with a written notice of the time, place and perſon he is to attend, in order to be examined; but he is not ſuffered to take a copy, nor indulged with the ſight of the interrogatories previous to his examination, and no counſel or ſolicitor is admitted. However, the defendant, thus *inops conſilii & ore tenus*, may, if ſharp and learned enough, demurr to ſuch interrogatories as are leading, improper or impertinent. For there is no way but to anſwer or demurr.

When this ſcene is cloſed, the curtain draws up, and and he is brought before the maſter, with the interrogatories and depoſitions, and may have copies of both, and counſel and ſolicitor. The buſineſs of this officer is to report the whole matter, the refuſal or anſwer, with ſuch other particulars as he ſhall think fit. And upon his report the court proceed to judgment.

In North againſt Wiggins, an attachment was moved for at once againſt the defendant, for abuſing the officer who ſerved the proceſs upon him, and for ſpeaking contemtuous words of the court. But a doubt aroſe whether the rule ſhould be abſolute, or only to ſhew cauſe, where the words are ſworn to by one perſon only; the rule in 'chancery' requiring two affidavits, to deprive the party of the benefit of ſhewing cauſe. Whereupon a ſupplemental affidavit was filed, and the point not determined. However, Lord Chief Juſtice Hardwicke ſaid, " he ſhould be " unwilling to eſtabliſh a practice, that would put it in the " power of one hardy man to hinder another of an op- " portunity of defending himſelf, before he was reſtrained " of his liberty."*

The Court of King's Bench, when Lord Chief Juſtice Holt was at the head of it, ruled, that " there ought " to

* Strange, 1068.

" to be no interrogatory leading to a penalty †." But in the " 'K. againſt Barber,' the defendant having preſented " a petition to the common council of London, reflecting " on an alderman, and having uſed contemptuous words of " the Court of King's Bench, an information went for " the alderman, and an attachment iſſued for the court. " By the interrogatories the defendant was aſked whe- " ther 'he' did not preſent ſuch a petition, and uſe ſuch " and ſuch words? Whereupon he moved to have ſo much " thereof as related to the 'preſenting' ſtruck out, becauſe " it was making him accuſe himſelf of that which would " convict him of the libel. And the court ordered that " part to be ſtruck out, and ſaid he was not obliged to an- " ſwer it, 'but he might be aſked whether, when the pe- " tition was preſented, he did not ſay ſo and ſo.'" ‡ From whence I ſhould collect, that the court being no ways intereſted in the abuſe upon the alderman, would not be ancillary to the furniſhing of evidence on the information; which would, however, be the caſe, if the defendant confeſſed, in his depoſition or examination, his having uttered written ſcandal, for none other could be 'preſented.'

They permitted, for that reaſon, this interrogatory to be ſuppreſſed, but took care to pronounce, that he might be directly aſked as to his ſpeaking of the contemptuous words, which he was accuſed of having vented againſt the court, at the time that ſuch petition was preſented; leaving the proof of whom it was preſented by to another examen. The court charged him with contempt of them by ſpeech only; therefore the proof of that was all they wanted for puniſhment, and accordingly declared their opinion, that he might be interrogated 'as to that' point blank, which ſeems really to me to be 'an interrogatory 'leading to penalty, and which ought not to be,' by the rule above laid down. But thus it is, and always will be, when the party intereſted (no matter whether from pride, love of power, reſentment, or money) is to judge in his own cauſe, there is no meaſure obſerved. And in truth, to what other end any interrogation, as to the crime charged, ſhould be 'forced' upon the defendant in any criminal matter, I cannot conceive. Unleſs he be aſked to things leading to the conviction of himſelf, that is, to a penalty; I ſee not of what uſe ſuch examination would be to the

proſecutor

† 12 Mod. 499. ‡ Strange, 444.

profecutor or accuſer. It muſt be the moſt nugatory of all things. For which reaſon, to ſpeak the plain truth, this queſtioning inſiſted upon by the court in 'contempt,' is always to make a man accuſe himſelf, contrary to the unanimous voice of the laws of England, from the beginning of time down to the preſent: it is not, it cannot be in favour of him, or by way of letting him purge and purify himſelf; for, if it were, it would only take place when requeſted by himſelf. Indeed by what all the books ſay, this interrogation was introduced for the defendant's own purgation or purification, ſomewhat upon the ſame principle with the old wager at law. The judges conſtantly declare it is meant as a favour to him. And that it was originated for this purpoſe, I have not the leaſt doubt. But as managed at preſent, it is a downright inquiſition, and the moſt coſtly favour that can be preſſed upon a man. It is, in the lingo of the ſtreets, being deadly good; and, in the language of gentlemen, infamouſly nonſenſical.

Very little reflection will eſtabliſh, I think, to every man's conviction what is advanced. All the world know, that by our laws no man can be 'bound' to accuſe himſelf; now, if a libeller, or conſtructive contemnor of the court can be attached, and forced to give ſurety for anſwering interrogatories, or be committed in default thereof to the bonds of a priſon for life; and theſe interrogatories not only may, but muſt tend to his conviction, if anſwered affirmatively; I think the neceſſary concluſion is, that a man in fact can be bound to accuſe himſelf, although by law it is forbidden.

Is it not then, with reſpect to the law of interrogatories, the true expoſition (which is ſaid, as before-mentioned, to be the rule in chancery) that it never ſuffers perſons to be examined againſt their will, 'to bring themſelves into contempt;' but, where a contempt is expreſsly ſworn againſt them, and they deſire it, the court will give them leave to be perſonally interrogated to clear themſelves. In ſuch caſe, the queſtions cannot be too direct, leading and pointed. He has waved the law in his favour, hoping and truſting he ſhall be gainer thereby. *Volenti non fit injuria.*

I have no authority for ſaying, ſuch will be the conſtruction of my lord commiſſioners; but I am quite ſure it will be that of common ſenſe, the old friend of their friend my lord Mansfield, who has never avowedly departed from it, but for the ſake of reverſing Mr. Wilkes's outlawry, (which was at worſt but a kind ſort of treachery

chery) and then his lordſhip took the trouble, in a memorable introductory ſpeech, to declare, that he was free from fear; although the audience, it muſt be confeſſed, was very numerous and formidable in its appearance, the cauſe a little tickliſh, and the panegyric upon his own fortitude ſomewhat extra-judicial and irrelevant to the matter before the court, as well as abſolutely uncalled for by the merciful judgment he was reſolved to conclude with. It was in truth a mere oratorial excreſcence, if I may be permitted *(pace tanti viri)* ſo to ſay. 'And now I moſt cordially' beg pardon for being ſo eccentric myſelf. *Petimus damuſque viciſſim.*

I have heard ſome common-rote lawyers talk of this extortion of an anſwer to interrogatories, under pain of perpetual impriſonment, as analogous to the forcing of a criminal at the bar, to hold up his hand and plead, under pain of being preſſed to death. The preſſure, or penalty, I confeſs is not much leſs afflicting; but I deny the ſimilitude, unleſs the party be forced to plead guilty, or upon his oath to declare he is not guilty; neither of which particulars did I ever yet ſee, or hear any example of in this country. On the contrary, all judges uſe, as it were, a gentle ſort of force, to induce every priſoner, or defendant, to ſay he is not guilty. No oath is required, and the Engliſh law abominates the idea of pleading under ſuch a poſſible torture to the conſcience, in any criminal proceeding. Theſe ſhort-ſighted lawyers then ſay, the impriſonment is not for the original contempt, but for the ſubſequent one; and 'that' ſurely is an actual reſiſtance of the court; and the commitment is not for life, but until compliance with the rule and order of the court. This is a moſt ingenious vindication, and would have ſome weight did it not proceed from *petitio principii*, the begging of the very queſtion in diſpute, which is, the right of the court to make ſuch rule or order. And therefore until that right be made out, I ſhall not make any anſwer to ſuch followers, bullies, and bravoes of ſo truly impertinent a beggar, however ſturdy in mien.

The court profeſſes the examination to be inſtituted as a favour to the defendent; if it be ſo, it is not of ſtrict right, and if the perſon to be indulged does not deſire it, but proteſts againſt it, what pretence can there be for its taking place? There is really much good ſenſe and humanity in the inſtitution itſelf. It is the abuſe of it which

is alone to be complained of. For a party may *prima facie* appear to have done ſomething deſignedly to prevent the execution of juſtice, and cannot bring proof to exculpate himſelf. He therefore ſues to the court, as for a favour, to be permitted to ſwear to his own innocence. The proof of his ſuppoſed guilt not being concluſive, the court think it not unreaſonable to admit of this ſelf-purgation, provided he will ſubmit to be examined by their own officer, *ore tenùs*, on ſuch interrogatories, as he in conjunction with the proſecutor ſhall adviſe. All this is fair, equal, and juſt; and he has no right to aſk beforehand for a ſight of their queſtions, in order to contrive anſwers. But, the practice that has of late years obtained (in conſequence of ſo merciful and wiſe an original ordonnance, in caſes not ſelf-evident,) is carried to a degree of oppreſſion, that makes all mankind ſtartle at the poſſible conſequences. Inſtead of letting a defendant, who craves it as a mercy, be at liberty to exculpate himſelf on interrogatories; every defendant is now compelled to a perſonal examination; and, if he obſtinately reſiſt, to a priſon, to laſt during his rebellion. A true ſenſe of this has drawn the courts into the moſt ridiculous dilemmas at times. The very mobility are not ſo blind as not to ſee what occaſioned the contemptible upſhot of the proceedings in your caſe, Mr. Almon, ſome years ago, and in that of Bingley very recently. And ſuch will ever be the diſgraceful retreats and repulſes of raſh and inconſiderate falliers beyond the ramparts of the law, whenever a true manly defence and reſiſtance are made, upon the ſound bottom of the conſtitution.

Where the law of the land protects every man from accuſing himſelf, what is it leſs than tyranny, under the guiſe of juriſdiction, let it be ſupported by whatever uſage it may, to force any one to anſwer upon oath to interrogatories, which he cannot perhaps do without affording proof for his own conviction? I call it force, becauſe if the culprit does not comply, he is impriſoned for his contempt of the court in not complying; and ſo he muſt remain until he purge this contempt, which can be done by no other way than by anſwering. If this be not the being put to torture, or to the queſtion, as foreigners call the rack, I know not what is. There is no ſolution to the original abſurdity of forcing a criminal to do what tends to the condemnation of himſelf out of his own mouth; the ſetting about it involves us only in a circle of abſurdities, of which every ſucceſſive one ſeems to be the greateſt.

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The obvious juſt procedure is this: When a perſon is ſummoned, or laid hold of for contempt, he ſhould be informed of the particular contempt, for which he has drawn upon him the hand of the court, and aſked whether he chooſes to be admitted to clear himſelf on interrogatories, or what other defence he can or will make. If the caſe be not ſuch in its own nature as can admit of no defence, and he declines being examined, the court may fix a day for hearing ſuch defence, and commit him, or not, in the mean time, as they ſhall ſee fit, or as the want of ſureties may render expedient; and when the day comes the court ought to enter into the enquiry, and determine as the merits of the caſe ſhall require. If it be a favour, the court may, or may not accord that favour, to let him have an opportunity of clearing his conduct by his own oath, in anſwer to ſuch queſtions as they ſhall think fit to put to him. If the caſe be ſuch, that they think he is not entitled to that indulgence; or if he is afraid of the conſequences of ſuch examination, being conſcious of his own guilt, and therefore craves no ſuch indulgence; there is an end of that matter. When the contempt has paſſed in view of the court, there can be little hoped from ſuch examination, and no great occaſion for it, unleſs there be a poſſibility of its not being wilful. An affidavit of his circumſtances may mitigate his fine. If the charge be grounded on affidavits, he will probably be permitted to defend himſelf by affidavits. But in whatever way the thing be put, the court ſhould come to judgment upon it. If the party reject the offer and chance of ſelf-exculpation by interrogatories, and has no evidence to produce in his behalf, his fate muſt be determined by the ſtrength and proof of the charge againſt him. Should he pray to be received to purify himſelf upon his own oath, no interrogatory ſhould be liable to his objection but one that tended to make him accuſe himſelf of ſome other crime; it cannot be too pointed, perſonal or particular, to any part of his own conduct, for which he then ſtands arraigned, and which he has no other means of clearing than his own oath. But, if he be fearful of ſuch rigid examination, as, if really guilty, and a man of conſcience, he may well be, and therefore declines it, nothing can be ſo ridiculous as the forcing him to it out of kindneſs, unleſs it be the pretended goodneſs of prieſts, in putting men to the wheel, in the fire, or on the gibbet, *pro ſalute animæ*, or in order to ſave them from damnation and hell flames. You are a heretic, come and confeſs your ſins, that I may in-

flict ſuitable puniſhment upon you; if you do not, I will put you to death for not confeſſing them; I act out of regard to your own ſoul.—This is the language of the ſanctimonious inquiſitor. The legal queſtioner ſays, I have ſeized you becauſe you are a defier or breaker of the law; ſubmit to avow upon oath your crime, that I may have indiſputable ground for proceeding to ſome penal ſentence againſt you; if you do not, I will confine you to a priſon for the reſt of your days; it is from a principle of mercy that I proceed throughout. The penance layed by the church, or the penalties by the King's-Bench, are not of great eſtimation in making up this account, but the ground for the proceeding ſeems to be of the ſame ſtuff.

In Lilbourn's caſe, the attorney general, if I remember right, ſeeing the defendant refuſed to be interrogated upon oath, prayed the court then to proceed to judgment without. And this was a proper ſtep. There need be no ſuſpenſion of juſtice in ſuch event. I forget now what happened in your caſe Mr. Almon. There was ſome blunder, I believe, in the title of the affidavit; and the court not caring for any further proceeding in ſo clamorous a buſineſs, took advantage of that circumſtance to let it drop. In the 'K. againſt Bingley,' the defendant was obſtinate, and would not be examined; the conſequence of which was, his being committed to priſon for his contempt, in not ſubmitting to be examined, and there lay for two years, till the crown thought the matter might by and by occaſion ſome ſerious complaint, and therefore he was let out, in the ſame contumacious ſtate he had been put in, with all his ſins about him, unanointed and unannealed. If my memory does not fail me, there was ſome coquetry between the court and the attorney-general, upon this very article, about who ſhould undergo the ridicule of letting him eſcape. Mr. Attorney, tried to put it off upon the court, by telling them, upon his being brought up, he had nothing to pray againſt him. The ſagacious and noble lord who preſided ſmelling a rat, or knowing there was one, was not to be ſo taken in, and therefore aſked, what it was Mr. Attorney had to aſk of the court? to which Mr. Attorney ſaid again, he had merely informed them, that the defendant Bingley was there, and that he ſhould move nothing further about him. After a little pauſe, and a recovery from the inertneſs of this anſwer, the chief at laſt let him know, that if he moved nothing, nothing could be done, and every thing would remain as it was, the conſequence of which

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was, that the defendant would ſtill be in cuſtody; the court never acted from itſelf, but upon motion from without. Mr. Attorney, finding it was in vain to be waſting more time about who ſhould do what was agreed to be done, in a very manly manner, took the thing upon himſelf, and ſaid, then I move that he may be diſcharged. And thus ended, in this pitiful manner, this paltry buſineſs; and yet perhaps it was, all things conſidered, the beſt way in which it could be put an end to, diſgraceful as the mode muſt be, to the real as well as apparent proſecutor of it, and let down as government could not but be by ſuch a deſertion of its object. The only gainer, was a ſhabby pamphlet-ſeller or ſtationer, who fattened and throve upon the reputation of patriotiſm, by being in priſon under the pretence of it, and who wiſhed for little more than to be tranſlated from the King's-Bench priſon to Newgate, that is, from the Borough to the city, or from the rear of the army, to the head quarters; and was pretty indifferent about his perſonal liberty, provided his preſs moved freely, and found a large vent for his productions.

However, I cannot here help obſerving, that altho' I have ranged the laſt three caſes together, yet I mean not to have them confounded, as of the ſame nature. That of Lilbourn went upon the charge (whether true or falſe matters not at preſent) of an actual contempt of an order of a legal court, and therefore had a bottom, which the others had not, as being in ſupport of that courts orders, which had been in fact infringed by the defendant. But the two latter were for libels, which, by a criminal conſtruction only, were deemed to be written in ridicule of, and therefore in contempt of ſome legal adjudications, or of one of the judges of the King's-bench; as what is ſaid in diminution of one judge has (I am told) been conſtrued to be in degradation of the whole court, that is, of all four judges, by virtue of an arithmetic peculiar to Weſtminſter-hall. Now, libels, or defamatory expreſſions out of court, upon what hath paſſed in court, are no let or hindrance to the proceſs of the court, or to national juſtice; they do not break a ſpring, clog the wheels, or ſtop the vibrations of the juridical machine, either in or out of court, and therefore do not neceſſarily require inſtantaneous remedy. Nothing but abſolute neceſſity can warrant commitment before trial by a jury, the right of every man by *Magna Charta*. Actual breach of the peace, and actual contempt of law proceedings vindi-

cate upon that principle ſuch reſtraint. No other offences do, and leaſt of all thoſe committed by writers. The perſons abuſed by them are likewiſe of all mankind the laſt who ſhould judge them. The reaſon alledged for attaching them, and for not calling in their country to try them, is the very reaſon for it, namely, its being a public offence; for who can be ſo concerned to have it puniſhed? But, if after all, this power of attachment can be vindicated in conſtructive treſpaſſes and contempts, contrary to the fundamentals of the conſtitution, and to Magna Charta, without neceſſity, and without conſtant and uniform uſage, it is utterly inconceivable how a freeman, accuſed of a miſdemeanor, ſhould be forced, under the pain of perpetual impriſonment, to anſwer upon oath to interrogatories, tending to make him accuſe himſelf. That they do ſo is evident, for unleſs the anſwering them one way would convict him, the anſwering them the other way could not clear him; the affirmative muſt do one in the ſame proportion that the negative does the other. And, as the Iriſhman would ſay, is it not ſtill more inconceivable how this ſhould be done out of favor to him; how the enforcers of this interrogation, under ſuch a dreadful penalty, in oppoſition to the moſt fervent deprecation, can call it indulgence, and a mere act of mercy!

The humanity, the ſenſe, and the law of the proceeding, are equally ſound. And if ſuch reaſoning be the effect of one ſcience, or of the ſeven, an ounce of mother wit is preferable to them all. Indeed ever ſince the promotion of a learned chief, and the principles of things, I have been leſs inclined to put up with legal nonſenſe than ever. Forms muſt be matters of poſitive inſtitution, but judicial determinations require rational grounds. I follow my great leader therefore in the latter, and try his own ſteps by the teſt, not inſtantly ſcouting a caſe, becauſe it is old, but diligently ſearching after the principles upon which it is built, from a fearfulneſs of paſſing over ſome excellent foundation, and an unwillingneſs to unhinge the whole law of my country, by precipitation, and too ſtrong a prepoſſeſſion in favour of my own underſtanding, finding there was ſome ſenſe, as well as ſome honeſty in the world before I was born; and gathering from experience, that nothing is ſo material to the ſubject, as to have the law for his perſon and his property known or ſettled. I am therefore for originating no new principles, but for judging preſent caſes by the principles, and not by the caſual terms and expreſſions, of the paſt. In matters of

practice,

practice, or forms of proceeding, I am for adhering moſt ſcrupulouſly to the rules of my predeceſſors, leſt by departing from them I ſhould at my own departure leave no rule at all. Thus it comes about, that if I were a privy counſellor, I ſhould not think of ſending a caſe from that board to the King's bench, (eſpecially were I the chief juſtice of it) for their opinion, unleſs I found ſome precedent for ſo doing; as I ſhould rather deem it pragmatical to introduce ſo important an innovation into the ſtate upon my own ſingle authority; and yet whether in ſome caſes it might not be done with good effects, I have my doubts; although were I to venture upon ſuch bold regulations, I would much rather be for transferring the whole judicature on appeals from the colonies, to the Houſe of Lords, like thoſe from Ireland, in order to let all Britiſh ſubjects ſee that the majeſty of this government, in its dernier reſort, reſted in the parliament, and the ſupreme council of the nation. But whigs and tories, whether in or out of ermine, will upon theſe points differ upon principle, and being but a ſmall man myſelf, it becomes me not to preach as it were, *ex cathedra*, eſpecially of mighty perſonages at the head of affairs, inveſted with the paramount judicature of the whole realm, and the diſpenſation of all the law, both ordinary and extraordinary, criminal, civil, and political, throughout the vaſt Engliſh world. After theſe pompous ideas, I cannot ſubmit to talk of the King's Bench, the Chancery, the Privy Council, or even of the Houſe of Lords, and therefore I will have done. But do not ſtare at my jumbling ſo many juriſdictions together. Things are ſometimes ſtrangely connected. Did you never hear *qui facit per alterum facit per ſe.* It is nothing to me whether enormous vanity, high church principles, ambition, or private intereſt, ſway men moſt. I do not like to have any man conceit himſelf wiſer than the whole world beſides, for, being a dealer in ſcraps of Latin, like other old fellows of the laſt age, the ancient adage occurs to me, *nemo omnibus horis ſapit.* And I believe your dealers in ſophiſtry very often impoſe upon themſelves, as well as upon the world. The frequent uſe of it perverts ſome how the natural judgment. And the worſt of it is, that the run of mankind cannot ſee through it. For my own part I am perſuaded, that more miſchief might be done to liberty, by putting a man with a clever talent of this ſort at the head of the law, than ſuch a boiſterous fellow as Jeffreys. A violent magiſtrate is not ſo dangerous as a

ſpecious ſophiſticator; the latter with the heart of a deer, and much civility, will compaſs more perverſion of the legal rights of the ſubjects, than the other with the heart of a lion, and the manners of a bear. Open violence ſets every body upon their guard, and is obvious; the other ſupplants your underſtanding, and ſeduces your judgment, by talking always of general principles, and apparently aſcending to, or deſcending from them, by ſome artificial thread, ſo curiouſly wrought, and ſo thoroughly diſguiſed, as to require almoſt the touch of Ithuriel's ſpear to be diſcovered. I am therefore for Lord Mansfield's oracle of reſort, (when preſſed by the aſtuteneſs of cunning pleaders, and their black letter caſes) plain 'common ſenſe.' Upon this even ground it is, Mr. Almon, that I addreſs you, and declare I cannot underſtand, how a jury finding maſter Woodfall guilty of printing and publiſhing the paper only, and afterwards, by affidavits, denying upon oath, their belief of the criminal conſtruction laid upon ſuch paper; and all this being diſcloſed to, and taken notice of by the King's Bench, can by that court be deemed to have found the ſaid Woodfall guilty generally of the charge made upon him. To arrive at ſuch a concluſion, I think their progreſſion muſt be like that of the prince of darkneſs:

——in many aery wheel.

I can as ſoon be perſuaded that the ſtripping of members of parliament of privilege, in matter of libel, by a reſolution of both houſes, that is, of privilege againſt crown-proſecutions for writing animadverſions upon adminiſtration and leaving it in every petty miſdemeanour and treſpaſs againſt the ſubject, was a ſhield for the liberty and freedom of the common-wealth, or agreeable to the meaning of former reſolutions, or the law of the land. This, however, is matter of opinion, and I may be miſtaken in the whole of it, as recluſe individuals frequently are. But were it put to me for my option, and were I a member of parliament, I would much rather have concurred in a reſolution eſtabliſhing the clearly illegal general warrants. And yet I have no predilection for ſtate libellers, and abominate thoſe of them who do not confine themſelves to miniſters, and their actions as ſuch, but rake into all the paſſages of their private life, and ſtir queſtions tending to the diſſolution of the Britiſh ſtate, both in its conſtitution and its empire. The public robber on the highway is, in my opinion, a leſs noxious and culpable ſubject. I wiſh to go on as we have done, without any novelties or refine-

ments

ments in the adminiſtration of juſtice, without one branch of the legiſlature breaking in upon the other, or any part of the Britiſh ſubjects withdrawing from the dominion of the king and his parliament, the only poſſible ſovereign over the whole. If any private reflections have eſcaped from me, I ſhall lament the lapſe, for I bear no perſonal enmity to any man breathing, and wiſh only to advert to their public conduct, meaning to die in the ſame mediocrity and obſcurity I have lived, and whilſt I ſtay here to judge of men's actions by my own underſtanding, and not by the political gloſſes either of their admirers or their ſatiriſts. The deficiency of deep profeſſional learning and practice, muſt excuſe my want of neatneſs in legal expreſſion, and the ſeeming elaborate verboſeneſs of my ſtyle may crave ſome pardon, as it is partly occaſioned by the deſire of being fully underſtood, and partly by diſguiſe of writing, a natural ſcantineſs of expreſſion, and a very confined ſphere of converſation, And I need not add, that if I did not regard ſome perſons as ſuperior beings, and capable therefore of doing much good or hurt, I ſhould not have ſo much attended to their proceedings, ſo that my making them the topic of obſervation is panegyric, as far as my poor words can ſcatter either praiſe or blame. Had I been inclined to have taken more pains, I ſhould have been much ſhorter. The loſs on this account will, I fear, Mr. Almon, be yours; and if a great book be a great evil, a huge pamphlet is a moſt enormous one. But I grow old, lazy and ſtupid. And ſo once more, good night.

God preſerve the ſtate.

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